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THE LAW OF MALPRACTICE.

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PART I.—MALPRACTICE IN CIVIL CASES.

In a previous article* we considered the rules and principles of Medical Evidence and their application by the courts. The grave defects which we then pointed out in the system of practice, which, by intrusting the selection of skilled witnesses to the parties in a suit, too often perverts truth and justice to secure a partizan triumph, are sometimes strikingly apparent in the verdicts of juries in cases of alleged malpractice.† If the results of these cases, however unfortunate they may be for the defendants, and incidentally injurious to the medical profession by impairing public confidence in the skill and integrity of its members, shall be the means of effecting a reform in the system, the experience will be cheaply purchased. For, as we shall have occasion to show, the injustice which is sometimes done in this way is not owing to mistakes in the law as laid down by the courts, but to misapprehension of the facts by juries. One evidence of this is found in the small number of cases of malpractice which are carried to the tribunals of last resort on points of law. In the ninety-nine volumes of Massachusetts reports there are not half a dozen cases of this kind, and the reports of sister States and of England show a similar paucity. The first American editor of Taylor's Medical Jurisprudence, himself a prominent physician, while admitting that most of our judges have done their best to secure just verdicts in actions for alleged malpractice, complains that juries are notoriously stupid and unjust.‡ Since this sweeping charge was made, however, there has been a marked improvement in this respect, and the change is creditable to the increased intelligence of the people of whom jurors are in general no unworthy representatives.

The foundation of the liability of the medical man for malpractice rests on well-settled principles of the law of contracts, which are of salutary influence and extensive application. By undertaking the practice of his profession he enters into an implied agreement with his patients that he has ordinary skill in the treatment of disease, and that he will apply that skill with ordinary and reasonable diligence and care. In requiring from him the possession and exercise of these qualifications, the law exacts no more rigid obligation than it imposes on any persons who offer their services to the public for a compensation, in any trade or profession requiring preparation and skill. The same rule is enforced upon the artisan as well as upon the physician or the lawyer. In its application, however, there is a special reference to the nature of the employment and the character of the service. Thus the degree of care and skill usually exercised by the blacksmith will naturally be less than that which is shown by the watch-maker, yet both are defined by the term ordinary. Moreover, the different operations performed by the same workman will demand a different measure of these qualifications, which, however, come under the same general rule. The degree of care and skill, therefore, which is required by the law, is proportioned to the delicacy and difficulty of the service, and is usually less in the case of the artisan who deals only with insensate matter than in that of the physician or surgeon who operates upon the complex, sensitive and delicate machinery of human life and health. The reason why extraordinary skill is not required from the medical man in consequence of the grave responsibilities which rest upon him is, that if the standard of qualification were placed so high, few practitioners would be able to attain to it. The result would be

* See No. 26, vol. iii., July 29, 1869.

† Taylor's Medical Jurisprudence, 6th Amer. ed., pp. 274, 304. An extraordinary case of incompatible and conflicting opinions of medical experts upon identical facts is reported in this Journal, vol. 72, pp. 250–252. "Who will credit medical testimony," says the writer, "if on a question of science it is so utterly irreconcilable?"

‡ 6th Amer. ed., p. 304.

that while the rich would be able to procure the best medical assistance, the mass of the people would suffer from the want of competent attendants, and thus become the easy victims of quacks and pretenders, so that disease and death would reap a more abundant harvest. In adopting a criterion of skill which is adjusted to the average proficiency of medical men, the law helps to protect the public from imposition and quackery, and obliges the physician to keep up with the improvements in his art or science, and thus tends to elevate the character of the profession. It chooses that middle course, which experience has shown to be requisite to hold men to the responsibilities of their position without imposing on them unreasonable and excessive burdens.

The liabilities which the law enforces on the medical practitioner are, as we have seen, the result of his publicly assuming a professional character. By availing himself of the advantages which such a character confers, he incurs also its corresponding responsibilities. But a different rule is applied to an unprofessional man who is called upon to render professional services. The physician or surgeon is liable for injuries resulting from his want of ordinary care or skill, because his position implies the possession and exercise of these qualifications, and this is the case even where the services are rendered gratuitously. But if a patient applies to a person who is not a medical man for his gratuitous assistance, who, either does not exert all his skill, or administers improper remedies to the best of his ability, such person is not liable.* The physician or surgeon is not, however, like the common carrier or the inn-keeper, bound to attend every one who solicits his service. He is entitled to perfect freedom in the selection of his patients among those who seek his advice and assistance. But while he is not liable for *nonfeasance*, that is, for not rendering professional services unless he has promised to perform them, he becomes liable for *misfeasance* or malpractice, if after entering upon his undertaking, his patient suffers injury in consequence of his unskilfulness or negligence. It makes no difference in this latter case whether he was to receive compensation for his services or not. If he merely promised to render these services *gratuitously*, the promisee could neither compel him to execute the promise nor recover damages for its non-fulfilment, for the promise, being without consideration, has no binding force in law.* But the acceptance of the trust, by commencing the discharge of its obligations, is a consideration which is sufficient to sustain an implied promise to execute it faithfully. The medical man, therefore, who neglects to perform the duties which are imposed on him by his professional position, is liable for any injury which may ensue to the patient by reason of his misconduct.† Although the physician may refuse to take charge of a case, yet if he once accepts it he cannot withdraw from it until recovery, unless dismissed by the party employing him or the patient without giving reasonable notice of such intention, so that another medical attendant may be secured. The implied promise of the patient to pay is a good consideration for the physician's promise to attend him, and having once undertaken to treat the case, the physician who should abandon it without due notice to the other party would be guilty of negligence which would render him responsible in damages for malpractice to the patient who was injured by such misconduct. The patient may, however, dismiss the physician at any stage of the treatment without any previous notice, or assigning any reasons therefor; because the contract on his part being for no stipulated time, he is at liberty to rescind it whenever he may judge proper.‡ But the physician, even after dismissal, is liable for any injuries which are traceable to his misconduct, although another medical attendant may have assumed charge of the case.

The doctrine that the confidence reposed in a medical man by the patient whom he has undertaken to treat, imposes upon him an obligation to exercise ordinary care and skill, has been applied in cases where no privity of contract subsisted between the parties, and it has been held that where a surgeon is employed at public charge to attend a dispensary or hospital, or renders services at such places gratuitously, he is liable to a patient just as if the latter had specially retained him. The reasons for this rule were forcibly expressed by Baron Garrow, in the case of Pippin v. Sheppard.§ "In the practice of surgery particularly," said the learned judge, "the public are exposed to

* Per Heath, J. in Shiels v. Blackburn, 1 Henry Blackstone, 158.

* Thorne v. Deas, 4 Johnson, 84.

† Shiels v. Blackburn, 1 Henry Blackstone, 159.

‡ Ordronaux, Jurisprudence of Medicine, p. 98. But where an express contract is made with a physician to render professional service during a stated period, and for a fixed salary, he cannot be legally dismissed before the expiration of the term, and can recover the amount of his salary if he is prevented by the other party from fulfilling his engagement. McDaniel v. Yuba Co., 14 California, 444.

§ 11 Price, 400.

great risks from the number of ignorant persons professing a knowledge of the art without the least pretensions to the necessary qualifications, and they often inflict very serious injury on those who are so unfortunate as to fall into their hands. In cases of the most brutal inattention and neglect, patients would be precluded frequently from seeking damages by course of law, if it were necessary, to enable them to recover, that there should have been a previous retainer on their part of the person professing to be able to cure them. In all cases of surgeons retained by any of the public establishments, it would happen that the patient would be without redress, for it could hardly be expected that the governors of an infirmary should bring an action against the surgeons employed by them to attend the child of poor parents, who may have suffered from his neglect and inattention; and are they to be without remedy because they cannot get the names of the five hundred persons by whom the surgeon was employed, to insert in their declaration?" In cases of this kind the medical man has a two-fold liability—first, to the parties employing him for a breach of his contract with them; and secondly, to the patient for injury inflicted upon him. This is in conformity to the well-settled principle of law, that an individual may be liable to one person upon contract and to another for tort in reference to the same transaction. Upon this ground if an apothecary administer improper medicine; or a surgeon unskilfully treat his patient, the law holds them liable, though their contract was with a third person.*

The medical man is, as we have seen, subject to the general law of contracts. He is also sometimes held to special responsibilities in consequence of the nature of his employment. In the view of the law his agreement is not limited to attendance from day to day, but has reference to the conduct of the case as a whole, whenever a course of treatment becomes necessary. It comes therefore within the purview of the principles applicable to *entire* contracts. The law in regard to such contracts, so far as it relates to compensation for service or labor, has been thus expressed by Chancellor Kent. "The refusal or omission to perform the entire labor or service without any act or consent of the other party, will not entitle the party who has performed in part to recover any compensation for the service which has been performed. The entire performance is a condition precedent to the payment of the price, and the courts cannot absolve men from their legal engagements, or make contracts for them."† It follows from the principles just referred to governing entire contracts, that if a physician or surgeon is employed to treat a broken limb or any disease requiring definite attendance, and he is guilty of malpractice in any part of the treatment, he cannot recover compensation for the rest.‡ For where a party undertakes a work of skill and labor, and fails in the object, so that his employer derives no benefit from the work, the plaintiff is not entitled to recover anything.§ But when such unskilfulness or negligence is set up in defence to a suit for fees, the burden is on the defendant to establish it.‖ The legal presumption being against malpractice, it must be fully proved.¶

Although the medical man may undertake to perform a cure absolutely, yet unless he makes an express promise to that effect, he is only bound to exercise ordinary and reasonable professional care, diligence, and skill. If he chooses to guarantee a successful result, he becomes so far liable for the consequences, that he cannot recover compensation for his services should the case terminate unfavorably. His liability in this respect is no more rigid than that of any person who agrees to insure a favorable issue for the service or labor. Although it is often said that no person is responsible for not performing an impossibility, yet this doctrine is limited to acts whose performance is absolutely impossible. But if a party engages to do a thing which is accidentally impossible, the contract is binding, though he is unable to perform it. It is his own fault if, instead of providing against those contingencies which he knew might possibly occur, he undertakes something beyond his ability.** The physician or surgeon, therefore, who makes an express promise to cure, whether in consideration of a specific sum, or otherwise, cannot recover compensation for his services should he fail to fulfil his engagement.††

The medical man is bound, as has been said, to possess and exercise that degree of skill which is necessary for the ordinary and reasonable discharge of his professional duties. The standard will naturally vary in different countries and at different periods

* Hilliard on Torts, 2d ed., vol. i. p. 252.

* Kent's Commentaries, vol. ii. § 509.
† Bellinger v. Craigue, 31 Barbour, 534.
‡ Hupe v. Phelps, 2 Starkie, 480.
§ McClallen v. Adams, 19 Pickering, 333.
‖ Duncan v. Blundell, 3 Starkie, 6.
¶ Story on Bailments, § 217.
** Mock v. Kelly, 3 Alabama, 387.

in the same country, and the evidence which must be produced to satisfy the court and jury that this requirement has been complied with in a particular case will be that of medical experts. As the degree of skill demanded will depend upon the nature of the disease and the state of the patient, it may be said in general to rise in proportion to the delicacy and difficulty of the service. A mistaken opinion regarding the nature of the disease or the proper mode of treatment is not conclusive evidence of the want of due skill; it must be shown that such error resulted from the absence of that average proficiency to which we have adverted. The law recognizes the great diversity of talent and acquirement which exists among medical practitioners, and the impossibility of levelling the distinctions which nature and education have made. It does not, therefore, pronounce a physician or surgeon incompetent because he exhibited less skill than some of his more gifted brethren might have displayed, but it requires the possession and exercise of such knowledge and skill as will enable him to treat the cases that he undertakes with reasonable success. He must possess those qualifications which are adequate to the performance of the duties which, by the fact of his assuming a professional character, he declares himself able to perform, and without which no man has a right to imperil the health and lives of human beings by pretending to exercise the healing art.* These requirements are certainly not too rigid. They recognize the fact that the high standard of competency which is attainable by members of the profession in a great city, with access to medical libraries, dispensaries, and hospitals, does not exist among practitioners in small towns and villages. The highest talent naturally seeks the widest and most lucrative field for its employment, so that the standard of skill reaches its greatest elevation where the opportunities for its exercise and the rate of its remuneration are most favorable. It is true that in this progressive age, when the last results of European science are speedily transmitted to the most remote localities, a country practitioner may often be well informed in the literature of his profession, and attain a complete mastery of its accepted theories; but he cannot ordinarily have that high degree of skill and practical knowledge which is possessed by his favored brethren whose facilities for observing the various manifestations of disease and witnessing and performing important operations are far superior to his own. These considerations are of manifest significance in relation to the treatment of those diseases that have become specialties, which can only be successfully cultivated in a populous community. To determine what degree of weight should be attached to circumstances like these, is sometimes no easy matter, and Lord Ellenborough remarked in a leading English case† that he was at a loss to tell the jury what degree of skill ought to be required of a village surgeon. Necessity requires the treatment of disease under all circumstances and conditions, and if the standard of proficiency of the great city were enforced in the obscure village, people would suffer and die from the want of proper medical attendance, and become victims of the ignorance or temerity of the sciolist or the charlatan. As the law must be uniform in its application to these widely different conditions, to avoid the introduction of needless complications in the determination of cases of this kind, it is settled that the degree of skill required is that which usually characterizes the profession in the country and at the time when the services were rendered.† A lower standard than this would tend to degrade the character of the profession and jeopardize the safety of the public.

The duty of medical men in this respect has always been recognized and enforced by the courts, that impose similar obligation on every person who publicly exercises an art or profession which implies on the part of its practitioner special knowledge and acquirements. The doctrine was long ago expressed by Chief Justice Tindal, in the case of Lanphier v. Phipos.‡ "Every person who enters into a learned profession undertakes to bring to the exercise of it a fair, reasonable and competent degree of care and skill." The degree of skill required in any particular case will be proportioned to the importance and delicacy of the service, and the physician is liable for injuries resulting from his want of skill as well as for those which arise from his neglect in its application.§ The want of the proper qualifications, however, is not to be inferred, it must be proved.‖ Dentists are also required to use a reasonable degree of care and skill in the manufacture and fitting

* Leighton v. Sargent, 7 Foster, 460. Patten v. Wiggin, 51 Maine, 594. McCandless v. McWha, 22 Pennsylvania State R., 268.

* Seare v. Prentice, 8 East, 347.
† Moran v. Burnham, per Mr. Justice Ames, Boston Med. and Surg. Journ., Feb. 3, 1870.
‡ 8 Carrington & Payne, 478.
§ Long v. Morrison, 14 Indiana, 596.
‖ Hancke v. Hooper, 7 Carrington & Payne, 81.

of artificial teeth. But the exercise of the highest perfection of the art is not implied in their professional contract.* The possession of a medical degree, which has been properly obtained from an institution having authority to confer it, is *prima facie* evidence of ordinary skill on the part of its possessor.† But a parchment purporting to be a diploma to practise medicine, is not evidence of itself, that the college issuing it is a regularly constituted medical institution. That fact, as well as the genuineness of the diploma, must be established before the degree can be received in evidence.‡ To prove the validity of a diploma given to a physician by a medical college of another State, it must be shown that the college existed at the date of the diploma, that it was authorized by law to confer degrees, and that the diploma was duly executed by the proper officers.§ We may remark here that it is not the province of the courts to discriminate between rival schools of medicine, or to pronounce upon the relative value of their diplomas as certificates of ordinary skill in their possessors. To do this would not only be an assumption of critical knowledge, unwarranted by the nature of their studies and inconsistent with the object of their creation, but it would be a usurpation of the powers of legislative bodies. The latter alone have the right to grant franchises to medical institutions, and to determine what class or classes of practitioners, if any, shall be permitted to exercise peculiar privileges. But the power given by statute to medical societies, to make by-laws and regulations relative to the admission and expulsion of members, although conferred in general terms, is not an arbitrary, unlimited power. The by-laws, rules and regulations must not contravene or be inconsistent either with statutory enactments or with well-settled principles of the common law. Nor can they prejudice the rights of individuals by a retroactive operation. Thus a licensed physician, having the prescribed qualifications, cannot be excluded from the franchise on the ground that he did not conform to the conventional rules of the society at a period antecedent to his application, for the code of medical ethics, adopted by the by-laws of a county society, is obligatory on members alone, and its non-observance previous to membership furnishes no legal ground either for exclusion or expulsion. This doctrine was enforced by the New York Court of Appeals in a very recent case (1865),* in which the relator, a licensed physician practising in Buffalo, and a graduate of the New York Medical College, applied for a mandamus to compel the Medical Society of the County of Erie to admit him as a member. No question was made as to his possessing the usual qualifications for membership; but it was claimed that he had forfeited his right to admission by unprofessional conduct in advertising, through the public prints, his claims to peculiar skill in the treatment of asthma, consumption, and bronchitis, by the new mode of medicated inhalation in aid of the known and usual remedial agents. It was claimed by the majority of the Society that such advertisements were condemned as acts of empiricism by the code of medical ethics adopted in the by-laws and regulations of the Society,† and that though the objectionable practice had been discontinued by the relator, it was cause for the disfranchisement of a member, and therefore ground for the exclusion of an applicant. But the court decided otherwise in conformity with the doctrine just stated, and Mr. Justice Porter, in delivering the opinion, drew a clear distinction between the two cases. "The regulations embodied in the so-called code," said the learned judge, "are admirably framed, and commend themselves to every reader, as tending to raise to a still higher elevation the character of the learned and honorable profession to which they were submitted for approval and adoption. They are not limited in their scope to the range of moral obligations, but embrace express rules of conduct, in personal, professional and public relations. They are regulations in the various departments of morals and manners, of courtesy and etiquette, of delicacy and honor. They bind those who pledge themselves to their observance, but cannot be recognized in law as conditions precedent to the exercise of an honorable profession, by learned, able, and upright men, who have not agreed to abide by them. The non-observance of such regulations *may be made* cause for exclusion or disfranchisement, but it must be either by the agreement of parties or by the exercise of the law-making power."

The right of medical societies duly authorized by statute, to try, and expel members for immorality, or gross ignorance or

* Simonds v. Henry, 39 Maine, 155.
† Leighton v. Sargent, 7 Foster, 470. People v. Medical Society, 32 N. Y., 191, per Porter, J
‡ Hill v. Brodie, 2 Stewart & Porter, 56.
§ Hunter v. Blount, 27 Georgia, 76.

* Bartlett v. Med. Society, 32 New York, 187.
† The regulation in question was taken from the Code of Ethics of the American Medical Association, of which the relator was not a member.

misconduct in their profession, is unquestioned, and the fact that a society has once before refused to prefer charges against a physician does not preclude them from again preferring the same charges, for in such proceedings they are but accusers, like a grand jury, and may receive additional testimony, or reconsider the case, and change their determination upon the original evidence. And the trial and acquittal of a physician in a court of criminal jurisdiction upon the same charges brought against him by a medical society, are no bar to an inquiry under the statute for the purpose of depriving him of his right to practise medicine and surgery, for these are entirely distinct and independent proceedings, having different objects in view: the one having regard to the general welfare and criminal justice of the State; the other simply and exclusively to the respectability and character of the medical profession, and the consequences connected with or necessarily flowing from it.* But no by-law or regulation can be upheld, which is unreasonable and contrary to the policy of the law. Thus a medical society has no right to expel a member for violating a regulation of the society which established a tariff of fees for medical services to be performed by its members, and fixed a minimum salary to be received by any members who should be appointed to any public office in a professional capacity, although the society adopted a resolution declaring it dishonorable for any of its members to accept any appointment or perform any services mentioned in such tariff of prices at a less sum than was therein specified, and subsequently passed a by-law authorizing the expulsion of members who should violate this regulation.† Such a regulation, like a condition in a contract by which a business or professional man agrees not to pursue his vocation without limitation as to locality and time, is void because against public policy. The law encourages competition, and discourages restrictions on the rights of individuals to exercise callings which are beneficial to the community, deeming the interests of the people paramount to any private agreements.

This doctrine is especially applicable to medical practitioners, whose services are so indispensable to the welfare of society that all attempts to restrain their legitimate exercise are discountenanced by the law. No man or set of men has a right to make it a condition of a contract with a physician or surgeon, the breach of which, if held valid, would deprive him of his professional privileges, and thus impair his usefulness as a public servant, that he should be bound in his general practice by any fixed charge, for such a principle besides its other evil influences would encourage extortion and monopoly. The Supreme Court of New York, in the case above mentioned, declared the regulation void, and the expulsion of the member unauthorized and illegal, and that a mandamus would lie directing that he be restored or recognized as a member of the medical society.

In the view of the law the diplomas of different incorporated schools duly authorized to confer medical degrees are entitled to equal consideration. By the common law, any individual has the right to exercise any profession or business for which he is competent, and is only liable for injuries inflicted upon others. The application of this broad doctrine, which was mainly derived from the Roman law,* has been more or less restricted in practice by statutory enactments. In England these limitations are more rigorous than in this country, where there is a disposition to relax the salutary restraints which are of so much benefit in maintaining a high standard of medical proficiency. The abandonment of the license system, which was a guarantee that the practitioner had some qualifications for his position, has occasioned evils which can hardly be exaggerated, but the spirit of our legislators is sometimes so warm in favor of an unwise freedom for ignorance, quackery, and fraud, and of foolish prohibition for honest industry, that we can hardly hope for a change in this respect. This State has, like so many others, repealed the statutes which required as a condition to the right of recovery for medical services that the practitioner should have been licensed by certain medical societies, or obtained his degree from an authorized professional school.

As in the absence of legislative enactments the courts cannot exclusively recognize any particular system of medicine or class of medical practitioners, any person who makes the treatment of the sick his vocation is, in contemplation of law, a phy-

* In the matter of Smith, 10 Wendell, 449.

† People *ex rel.* Gray v. Erie Co. Med. Soc., 24 Barbour, 570.

* The philosophic Montesquieu, in showing how the character of laws depends upon the peculiar circumstances in which they are made, finds in the freedom with which the Romans permitted any one to practise medicine, a reason for the severe punishments that the civil law inflicted on the unskilful or negligent physician, which he contrasts with the qualifications required from medical practitioners in France, which obviated the necessity for such rigorous penalties.—*Esprit des Lois*, Livre 29, chap. 14.

sician, and this is the legal significance of the word when used in a contract. Thus, where an agreement of employment between an opera director and a vocalist provided for a forfeiture of a month's salary in case the latter should fail to attend at any stated performance, except in the event of sickness certified to by a doctor, to be appointed by the director, it was held that the provision was binding upon the artist, although the director appointed a person in the practice of what is known as the homœopathic system of medicine.* But although any person who is engaged in the public exercise of the healing art is, in the absence of statutory restrictions, entitled to all the legal rights of a physician, yet he is bound to practise according to his professed and avowed system.† For by holding himself out as a member of a particular school, the law presumes that the patient employed him in the belief that his practice would conform to his profession. It has accordingly been held that if the settled law and practice of the profession allows of but one course of treatment in a case, then any departure from such course might properly be regarded as the result of want of knowledge, skill, experience, or attention. If there are different schools of practice, all that any physician or surgeon assumes is, that he will faithfully treat the case according to the received law and practice of his particular school. These rules which have been laid down in a recent case‡ in Maine will illustrate the dangers which beset the medical man who departs in practice from the system which he publicly professes, rendering him liable to damages for malpractice in case of injury resulting to his patient, and preventing him from recovering compensation for his services, should no benefit be derived from his treatment.

In determining whether a physician or surgeon has exercised ordinary skill in the treatment of a patient, regard must be had to the advanced state of the profession at the time. A medical man is bound to keep up with the important inventions and discoveries in the healing art, so far as they have become the common property of the profession, and cannot shelter himself behind the usages and methods which later improvements have rendered valueless and obsolete. The progress of medicine and surgery has been so marked, in recent years, and the facilities afforded for the diffusion of the latest results of scientific investigation have been so great, that no medical practitioner can safely rely on these exploded theories, antiquated instruments or cast-off practices. Equally futile would it be for the unskilful operator to justify himself by the authority of some great name in medical science, whose modes of procedure, however valuable in his own time, have been superseded by others still more valuable and important. So marked has been the advance and diffusion of professional knowledge, that the tyro in surgery could teach Dupuytren and Hunter many lessons in their science; while many a medical student is familiar with truths of pathology, which would have astonished Bichat and Cullen. The achievements of the great men of the past should never be forgotten in the triumphs of a more advanced civilization, for the crucial test of greatness in practical affairs is the accomplishment of important undertakings with means seemingly inadequate to their fulfilment,* the unfolding of the germ, which only the favoring influences of a later day may develop into the mature and ripened fruit; but it is a matter of just reproach to their successors, if instead of promoting the interests of science and humanity, they seek to cover their own imperfections and deficiencies with the mantle of departed excellence. It was a subject of proud felicitation to Macaulay, in comparing the state of England in his own time with its condition in 1685, that every bricklayer falling from a scaffold, every crossing-sweeper run over by a carriage, could have his wounds dressed and his limbs set with a skill, such as all the wealth of Ormond or of Clayton could not have purchased.† All these improvements raise the standard of proficiency among medical men, and devolve upon them

* Corsi v. Maretzek, 4 E. D. Smith, 1.

We are aware that some of the foregoing cases do not come under the head of malpractice. But as this article is intended for medical readers, we have taken the liberty of introducing some matters of interest to them which are not strictly within the limits of the subject under consideration.

† Bowman v. Woods, 1 Iowa, 441.

‡ Patten v. Wiggin, 51 Maine, 594.

* A distinguished contemporary surgeon said of Sir Astley Cooper, "All instruments are alike to him, and I verily believe he could operate as easily with an oyster-knife, as with the best bit of cutlery in Laundy's shop." Memoir of Cooper in Pettigrew's Medical Portrait Gallery, Vol. I.

† History of England, Vol. I., p. 325, Philadelphia, 1856.—A distinguished English surgeon, in referring to the advance made in curative surgery in recent times, observes, "The most experienced are but students. As years roll on, cases of improvement occur in our history, which teach us that the advanced knowledge of this year would have rendered unnecessary the operation of the last. Within my own recollection, the operating theatre of St. Bartholomew's Hospital was the scene of weekly mutilations of the frame by the knife, while, at the present day, a little more than a quarter of a century, such operations are reduced to less than half of their former number." See Elwell on Malpractice and Medical Evidence, pp. 57–58.

responsibilities commensurate with their increased knowledge and opportunities for usefulness. The old reports are full of medical dogmas, which modern science has exploded, and which would not now receive the sanction of the accredited authorities in either profession. The evidence which, at the present time, would alone have any weight with a jury in questions of malpractice as determining the standard of ordinary skill, would be that of the recognized authorities in medical science at the time when the services were performed, as attested by their adoption in ordinary practice by competent members of that particular school. The doctrine has been well expressed by Mr. Justice Woodward, in a leading case in Pennsylvania.* "The law," said the learned judge, "has no allowance for quackery. It demands *qualification* in the profession practised—not extraordinary skill, such as belongs only to a few men of rare genius and endowments, but that degree which ordinarily characterizes the profession. And in judging of this degree of skill, in a given case, regard is to be had to the advanced state of the profession at the time. The patient is entitled to the benefit of these increased lights. The physician or surgeon who assumes to exercise the healing art, is bound to be up to the improvements of the day. The standard of ordinary skill is on the advance, and he who would not be found wanting, must apply himself with all diligence to the most accredited sources of knowledge."

The medical man cannot rely upon his acknowledged reputation with the profession or the public to protect him from the consequences of rashly and unskilfully experimenting upon his patient. This was the principle laid down in a case† tried in England in 1767, and frequently referred to in later decisions, in which Mr. Baker, a medical man of great eminence, who for twenty years had been first surgeon at St. Bartholomew's Hospital, and was a prominent lecturer on surgery and anatomy, and noted for his humanity as well as distinguished for his professional attainments, was mulcted in damages for £500, for unskilfully disuniting the callus formed on a fractured leg after it was set. It appeared from the evidence that the plaintiff's leg was first set by another surgeon, who a month after the operation found the leg was "healing and in a good way;" the callus was formed; there was a little protuberance, but it was thought not more than usual. It was also proved that at the end of nine weeks from the commencement of the treatment, the plaintiff was well enough to go home, and that when the defendant Baker and the apothecary who was sued with him first saw the patient they said he had fallen into good hands. On their second visit they expressed the same opinion, but on coming a third time some alteration was suggested, and the patient got into a passion, and was unwilling the defendants should do anything to his leg. He told them he was afraid they would disunite the callus, and, as his leg was straight, it was not necessary. Baker and the apothecary, Stapleton, then took up the leg without informing the plaintiff of what they were going to do. As one of the witnesses testified, "Baker took up the plaintiff's foot in both his hands and nodded to Stapleton; and then Stapleton took the plaintiff's leg upon his knee, and the leg gave a crack, when the plaintiff cried out to them and said, 'You have broke what nature had formed.' Baker then said to the plaintiff, 'You must go through the operation of extension.' A heavy instrument of steel, 'that had teeth,' was put upon the leg to produce the extension." Four months after the operation the patient was "still very ill, and bad of it." The surgeons who testified in the case said that compression and not extension was the proper mode of procedure, and that the instrument described as having been used by Baker was improper, one of them remarking that he had not the least idea of it. They bore witness, however, to Baker's high reputation for surgical skill and benevolence. In pronouncing judgment, Lord Chief Justice Wilmot said, "It is objected that this is not the proper action, and that it ought to have been trespass *vi et armis*; in answer to this it appears from the evidence of the surgeons that it was improper to disunite the callus without consent; this is the usage and law of surgeons; then it was ignorance and unskilfulness in that very particular, to do contrary to the rule of the profession, what no surgeon ought to have done; and indeed it is reasonable that a patient should be told what is about to be done to him, that he may take courage, and put himself in such a situation as to enable him to undergo the operation. That the plaintiff ought to receive a satisfaction for the injury, seems to be admitted, but then it is said the defendants ought to have been charged as trespassers *vi et armis*. The Court will not look with eagle eyes to see whether the evidence applies exactly

* Mc.Candless v. Mc.Wha, 22 Pennsylvania State R. 261.

† Slater v. Baker, 2 Wilson, 359.

or not to the case; when they can see the plaintiff has obtained a verdict for such damages as he deserves, they will establish such verdict if possible. For anything that appears to the court, this was the first experiment made with this new instrument, and if it was, it was a rash action, and he who acts rashly, acts ignorantly; and although the defendants in general may be as skilful in their respective professions as any two gentlemen in England, yet the court cannot help saying that in this particular case they have ignorantly and unskilfully acted, contrary to the known rule and usage of surgeons." Elwell, in commenting upon this case, remarks that strictly speaking, Baker was not chargeable with unskilfulness in trying this experiment, but that he was guilty of a rashness and recklessness that indicated a criminal intent or reckless disregard of life and limb, and was all the more blamable on account of his superior skill and knowledge.* But whatever may have been the technical offence, the evidence clearly establishes the culpability of Baker, and it seems to us that there was a conspiracy between him and the apothecary, of which the plaintiff was the unfortunate victim. This seems to have been the opinion of the Chief Justice, who said that the apothecary's advising Baker not to take the guineas offered him by the plaintiff, and his prompt action when Baker nodded to him, were evidence for the jury of his complicity. What, in the meantime, had become of Baker's "benevolence," is a question which we leave to the moral philosopher.

Where by improper treatment of an injury by a surgeon, the patient must inevitably have a defective limb, the surgeon is liable to an action, even though the mismanagement or negligence of those having the care of the patient, may have aggravated the case, and rendered the ultimate condition of the arm worse than it otherwise would have been.† This doctrine is of familiar application in the law, and regards the primary author of a wrongful act, which must be certainly followed by evil consequences, as fully responsible, although the ill effects of his action have been increased by the misconduct of others. The difficulty of apportioning the blame will not relieve the original wrong doer from liability. A more difficult question arises when the habits of the patient are alleged to have contributed to the injury. Where such habits are set up by the medical man in defence to an action for malpractice, he must show that there was such a connection in time between them and the injury that the relation of cause and effect could be reasonably presumed. Thus where it had been shown by the evidence of scientific men that a fractured limb of an intemperate man was more difficult to cure than that of a temperate man, but where no such evidence was offered of the degree of intemperance then existing, or how long it lasted, to show the difficulty of such cure; it was proper for the court below to refuse to allow the patient's habits and character, in this respect, to be put in issue for an indefinite period backward. It was enough to lay it open for seven years previous to the injury, if not too much.* On the familiar principles of law governing the relations of principal and agent, which make the former responsible for the acts of the latter within the scope of his employment, it is held that a surgeon is liable for an injury done to a patient through the want of proper skill in his apprentice; but in an action against him the plaintiff must show that the injury was produced by such want of skill, and it is not to be inferred. In this case, which was tried in England many years ago, it was decided that if a person goes into a surgeon's shop and asks to be bled, saying he has found relief from it before, and does not consult the person there as to the propriety of performing the operation, if there are no external indications of its being improper, such person is justified in performing it, and the surgeon will not be answerable for its not producing a beneficial result.† Though the principle embodied in this decision is a sound one, and is susceptible of an extensive application, it could not be extended to justify the reckless or indiscriminate administration of remedies of a notoriously dangerous character, for the medical man might thus be led to further the whims of ignorance or mania, and perhaps abet the scheme of the suicide. In ordinary cases, where a physician prescribes these remedies, it is obviously incumbent upon him to obtain from the patient or other sources such information in regard to his constitution and habits as would alone justify him in this treatment, and also to give such directions for their use as would be necessary to ensure their beneficial influence, or to avoid dangerous consequences. If from a neglect of these precautions by his medical attendant the patient should suffer injury, he would undoubtedly be liable for mal-

* Malpractice and Medical Evidence, p. 114.
† Wilmot v. Howard, 39 Vermont, 447.

* McCandless v. McWha, 22 Pennsylvania State R. 268.
† Hancke v. Hooper, 7 Carrington & Payne, 81.

practice. "In cases," for example, says Ordronaux, "where such drugs are prescribed as Battley's solution, preparations of opium, of morphia, hyoscyamus, conium, stramonium, aconite, belladonna, ether, chloroform, hydrocyanic acid, Indian hemp, strychnia, digitalis, &c., an omission to give directions for their cautious use with due warning of their dangerous powers, would justify a presumption of gross negligence."*

The doctrine laid down by the English courts that a surgeon is responsible for the want of proper skill in his apprentice would, on analogous principles of the law of agency, make the medical man who intrusts his students with the care of patients liable for injuries resulting from their unskilfulness or negligence. The student is under such circumstances the agent of the physician, who, by thus impliedly vouching for his competency, becomes responsible for his misconduct. Hence, if he vaccinate with unsound matter, or leech, or cup, or bleed, in such an improper manner as to cause injury, the medical man whose agent he is, becomes liable to the injured party.† It should be remembered that the treatment of a patient by a physician is a personal trust which has been reposed in him from confidence in his skill and judgment. It is a well settled principle of law that the execution of a trust of this kind cannot be transferred to another without the permission of the beneficiary. Such a transfer of authority, when made to another physician with the consent of the patient, would undoubtedly relieve the first practitioner from liability for the acts of his substitute. But the case of a student is different. In contemplation of law he is only the agent of the medical man who impliedly adopts and ratifies his acts done within the scope of his authority. Though the patient acquiesce in the management of the case by the student, his treatment is still that of the physician who for his own convenience uses him as a substitute. The liability of the physician or surgeon in such a case comes within the purview of the principle embodied in the familiar legal maxim, *Qui facit per alium facit per se.*‡ A principal, however, is not responsible for the criminal acts of his agent, and if, for example, poison should be wilfully administered by a student to the patient, the physician could not be held accountable, unless it were shown that he was in fact accessory to the crime, or believed or had reason to believe that the student was likely to commit it. But the line between criminal and civil responsibility is sometimes faint and shadowy. There can be no doubt that for acts of gross unskilfulness or negligence on the part of the student, indicating inexcusable ignorance of the art which he presumed to exercise, the physician who, by permitting him to treat his patients, impliedly guaranteed his possession and exercise of the necessary qualifications, would be liable in damages to the patient who had been injured by such misconduct.

Besides being legally bound to possess ordinary skill, the medical man is bound to carefully exercise it in the management of a case. The absence of ordinary care constitutes negligence which, when producing an injury to the patient, will make his medical attendant liable for malpractice. It is obvious that these requirements are mutually indispensable to the safety of society. As the possession of skill affords no absolute security that it will be diligently and faithfully applied, it is necessary to enforce upon the eminent practitioner the exercise in a reasonable degree of that assiduity which contributed to form his proficiency and establish his reputation, as well as to require it from the humblest of his professional brethren.* As we have previously shown, the gratuitous character of the service does not exempt him from responsibility. The law is no respecter of persons, and the poorest charity patient has the same right to faithful and considerate attention from his medical attendant as the millionaire. Gratuitous services are only honorable when they are conceived and executed in the spirit of a comprehensive benevolence, which regards the health and happiness of the patient as of far more importance than any pecuniary recompense, and the moral law is therefore fitly supplemented by the common law. The medical man, however, as we have seen, is not legally bound to undertake such services. They are imperfect obligations, which are voluntary in their inception, and it is only when he has actually entered upon their execution that they acquire a binding force

* Jurisprudence of Medicine, p. 68, note 1.
† Landon v. Humphrey, 9 Connecticut, 209.
‡ Ordronaux, Jurisprudence of Medicine, p. 103; Chitty on Contracts, 10 Amer. ed. pp. 226-7.

* "I make no distinction," said Baron Garrow in a famous criminal trial, "between the case of a person who consults the most eminent physician, and the case of those whose necessities or folly may carry them into any other quarter. It matters not whether the individual consulted be the President of the College of Physicians, the President of the College of Surgeons, or the humblest bone-setter of the village; but be it one or the other, he ought to bring into the case ordinary and reasonable care, skill, diligence and caution." Rex v. St. John Long, 6 Bingham, 449.

in law. Ordinary care is required from every person who undertakes for a compensation to perform a service for another requiring preparation and skill. But although the same rule is applied to the artisan as to the medical man, it does not follow, as has sometimes been supposed, that human life and health are regarded by the law as of no more consequence than insensate matter. Ordinary care, as defined by the courts, means the care which is usually exercised under similar circumstances by those who are engaged in the same employment. "Different things," says Story, "may require very different care. The care required in building a common doorway is quite different from that required in raising a marble pillar, but both come under the description of ordinary care." "It undoubtedly requires," says Elwell, "a higher degree of skill and care for the successful and safe treatment of *iritis* than that required in rheumatism, because, in the former case, the most important and delicate structure of the system is involved, the parts of which, when affected with an inflammation, may be soon destroyed, so rapid and dangerous is the disease; and unless treated intelligently, and with great promptness, blindness quickly supervenes; while, in rheumatism, but little, perhaps nothing, can be done hastily, it being a disease of the joints and muscular system, usually requiring a long course of treatment, giving to the attending physician full time to study his case, and apply his means of cure."* It is obvious, moreover, not only that different diseases will require different care, according to their distinctive peculiarities and the nature of the parts affected, but that the same malady or a similar wound or fracture, will exhibit such varied manifestations in persons of different sexes, ages, constitutions, and habits of life, and will be so modified by climatic and other influences, whose importance can only be appreciated by the experienced observer, that what would be ordinary care in one case would be gross negligence in another. It is for the jury, aided by the evidence of the medical experts, to determine whether or not the physician or surgeon has exercised that degree of diligence and attention which satisfies the requirements of the law. It is not surprising, perhaps, that misled by the cross-lights thrown upon the subject by conflicting scientific witnesses, who too often "lead to bewilder and dazzle to blind," they should sometimes wrongfully attribute to the carelessness or unskilfulness of the medical practitioner what is the result of the imperfect reparation of nature, to causes difficult of detection because they lie hidden in the recesses of individual organization, or are the product of external influences which elude the penetration of science. The law, however, is clear that the medical man in the performance of his professional duties is liable only for the want of ordinary diligence, care and skill, and the Courts have power, which has often been beneficially exercised, to set aside verdicts which are manifestly against the weight of evidence, and inflict excessive damages on the defendant.

What constitutes ordinary care depends, as we have seen, on the condition of the patient. No degrees are recognized in negligence, and the old rule that the physician or surgeon is only liable for gross carelessness is no longer in force. But medical men are not responsible for want of success, unless they have expressly guaranteed a cure, nor for mere mistakes in matters of reasonable doubt and uncertainty; but their undertaking is that they will use their best judgment in cases of doubt as to the best course of treatment.* The doctrine has been thus expressed in a recent English case. "To render a medical man liable, even civilly, for negligence or want of due care or skill, it is not enough that there has been a less degree of skill than some other medical man might have shown, or a less degree of care than even he himself might have bestowed; nor is it enough that he himself acknowledges some degree of want of care; there must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result."† It is a familiar principle of law that a person is not liable for injury to another whose own misconduct has contributed to it, because no man can be permitted to take advantage of his own wrong. This rule which recognizes and enforces the equitable doctrine that right and obligation are reciprocal, is of manifest application to the relation of physician and patient. It is the duty of the patient to co-operate with his professional adviser, and to conform to the necessary prescriptions, but if he will not, or under the pressure of pain cannot, he has no right to hold the medical man responsible for his own neglect‡. And though a defendant has been

* Malpractice and Medical Evidence, pp. 28, 29.

* Chitty on Contracts, 10th Amer. ed., 601, and cases cited.

† Rich *v.* Pierpoint, 3 Foster & Finlason, 35.

‡ McCandless *v.* McWha, 22 Penn. State R. 268.

guilty of culpable fault or negligence, producing an injury, yet if his act was not wanton and intentional, and the plaintiff by his own misconduct, or want of ordinary care, essentially contributed to produce the result, he cannot recover.* But the doctrine that a party cannot recover, where his own negligence concurred in producing the injury for which he seeks redress, does not bind him to the utmost possible caution, but to ordinary care and prudence only.† It has been held that an action for damages will be in favor of the husband against a surgeon for unskilfully operating upon his wife, notwithstanding she dies of the operation, and this principle applies to any case in which death results from improper treatment.‡ In cases where a young child has received injury from a physician's misconduct, the negligence of a parent, or other person to whose care the child is intrusted, has the same effect in preventing the maintenance of an action for such injury that his own want of due care would have if the patient were an adult. This is only the application of a doctrine to the case of physician and patient which has been enforced in other relations by courts of high authority, and which though questioned in some quarters, is the law in this Commonwealth and in New York.§

We have seen that a medical man is liable for injuries occasioned by his unskilfulness or negligence although the patient did not contract with him, as in the case of a hospital surgeon whose services were gratuitous. On the same principle it was held, in Kentucky, that a physician who administered medicine to a slave without the consent of his owner, was responsible for all the evil consequences which resulted from his act.‖ This doctrine was applied in a leading case in New York, in an action against a manufacturing pharmaceutist, in which it was held that a dealer in drugs and medicines who carelessly labels a deadly poison as a harmless medicine, and sends it so labelled into market, is liable to all persons who without fault on their part are injured by using it as such medicine in consequence of the false label. The liability of the dealer in such cases arises not out of any contract, or direct privity between him and the person injured, but out of the duty which the law imposes upon him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with such label may have passed through many intermediate sales before it reaches the hands of the person injured. Where such negligent act is done by an agent, the principal is liable for the injury caused thereby.* In this case a jar of the extract of belladonna was prepared and labelled by the defendant's agent as extract of dandelion, and as this false label was a continuous misdirection by the defendant, inevitably tending to mislead and injure others, he was justly held liable for the natural and probable consequences of his wrongful act. The liability of druggists for malpractice rests on the same ground with that of physicians, and Blackstone in his definition of *mala praxis* enumerates among the injuries thereby occasioned to a man's health those caused by the neglect or unskilful management of his physician, surgeon, or apothecary.† The doctrine, indeed, was expounded long before Blackstone's day, and may be traced back to the Roman Jurisprudence, which established a high standard of honor among medical men and stigmatized their unskilfulness or negligence as criminal.‡ The principle was recognized in an early English decision. In Tessymond's case, a chemist's apprentice delivered by mistake a phial of laudanum instead of one of paregoric, thereby causing the death of an infant. It appeared that the bottle of laudanum and the bottle of paregoric stood side by side, and the apprentice, who filled the phial, mistook one label for another. His unskilfulness or ignorance in a matter which he was bound to be conversant with, was held to be negligence, which made him guilty of manslaughter.§ In cases of this kind where the position of the defendant implies skill and knowledge, the malicious intent which is necessary to sustain an indictment is presumed from the absence of these essential qualifications.

This doctrine is of obvious application in the case of the dispensing pharmaceutist. He is held to more rigid liabilities than the dealer in ordinary articles of merchandise, because the substances which he compounds are, when misapplied, dangerous to human life and health. The general merchant or tradesman, in the absence of an express warranty, is not responsible for the

* Berge *v.* Gardiner, 19 Connecticut, 507.
† Ordronaux on Med. Jur., p. 81, and cases cited.
‡ Cro-s *v.* Guthery, 2 Root, 90.
§ Wright *v.* Malden & Melrose R. R. Co., 4 Allen, 283; Callahan *v.* Bean, 9 Allen, 401. A contrary doctrine is maintained in the American Law Review, April, 1870.
‖ Hord *v.* Grimes, 13 B. Munroe, 188.

* Thomas *v.* Winchester, 2 Seldon, 397.
† Commentaries, Book iii. p. 122.
‡ Institutes, Liber iv., tit. iii. § 6-7.
§ 1 Lewin's Crown Cases, 169.

quality of his wares, but the vendor of provisions for domestic use, by the fact of offering them for sale, undertakes and insures that they are sound and wholesome. Public policy, which dictates this requirement in the case of the provision dealer, makes the rule still more imperative in that of the dispensing pharmaceutist, who deals in substances more pernicious when abused, than those employed in almost any other vocation, and a familiarity with which is a matter of special knowledge not possessed by the public. The retail druggist or apothecary, therefore, impliedly warrants the nature and good quality of the medicines he dispenses. As the degree of care required is particularly high in matters affecting life and health, his responsibility is very great. He is not only bound to be able to compound and dispense the prescriptions of medical men, but he is also bound to have knowledge and care enough to detect manifest errors in such papers. He cannot shelter himself behind the mistakes of the medical man, for it has been held in this State that the physician who prescribes and the apothecary who compounds a noxious medicine are both liable for malpractice.* If, therefore, a prescription is presented to him, no matter by whom it may be signed, which on its face shows its dangerous tendencies, as if for example it calls for a preparation which is evidently designed for internal administration in poisonous doses, reasonable care would require him to refrain from furnishing it to a customer without satisfactory investigation. A neglect of these precautions would undoubtedly render him liable to a suit for damages or an indictment for manslaughter, according to the nature and result of the injury. To tamper with the dangerous and deadly drugs of pharmacy is to turn a beneficial agency into a hurtful channel, and such action by an apothecary, whose situation implies the exercise of a high degree of care and skill, is peculiarly culpable. Should death ensue from his gross unskilfulness or negligence, the excuse of good intentions will be unavailing, for under such circumstances malice is presumed from misconduct. And although the druggist is not accountable criminally for the acts of an agent, yet he is responsible in damages for injuries occasioned by the want of ordinary care or skill in his clerks and assistants. By the very fact of employing them he guarantees their proficiency, and if with or without his knowledge, in his presence or in his absence, the fancy goods clerk, shop boy, or other incompetent attendant, should imperil the health or lives of his customers by mistake in compounding a prescription, both principal and agent would be liable for the consequences. These principles were applied in a recent case in Philadelphia, where a druggist's clerk was tried and convicted of manslaughter for gross negligence in furnishing *atropia* on a prescription which called for *assafœtida*, three grains being given in four pills, thereby causing the death of an adult patient.* It appeared in evidence that the prescription had been already compounded five or six times by the defendant and his father. It was proved that the defendant had devoted many years to the study of his profession, and that he enjoyed an excellent reputation for skill as a druggist and for peace as a citizen. There was some dispute between opposing counsel as to whether the word assafœtida was plainly and legibly written, or whether it might not have been mistaken for atropia. The court in charging the jury observed that the question for their consideration was, "Did the defendant employ reasonable care in the preparation of this medicine? This involves two points: First, his reading of the word referred to; secondly, his knowledge of the deadly character of the drug he used. *For though he innocently mistook the language of the prescription, yet if the exercise of reasonable care would have warned him that he was preparing something which would inevitably kill, it would be criminal in him to go on.* The inquiry, then, is not whether he put in the proper drugs, or made a mistake, for his default herein would not necessarily be crime. But the higher and truer test is the exercise of reasonable care. If you find an absence of this reasonable care, you must convict the defendant. If you conclude that he was reasonably careful, or have a fair doubt of his guilt, you should acquit him."

The phrase ordinary and reasonable care is not here employed in its loose popular sense, but is measured by the dangers and responsibilities of the work done and the instrumentalities used, and pharmacy certainly requires a very high degree of attention and fidelity. In fact, under some circumstances, an act of omission is tantamount to the most wilful misconduct. This doctrine was applied in the case of Hollenbeck *v.* Fleet & Semple,† in which the defendants, a firm of druggists, were held liable

* Hilliard on Torts, 2d ed., vol. 2, p. 315, note a.

* Commonwealth *v.* Joseph H. Bower—Ordronaux's Jurisprudence of Medicine, p. 280.

† 13 B. Munroe, 229.

for their negligence, and that of their clerk, who, in compounding a physician's prescription for snake-root and Peruvian bark, pulverized these substances in a mill in which cantharides had been previously ground, without subsequent cleansing. The suffering and injury caused to the patient by this noxious mixture occasioned a verdict in his favor for damages to the amount of $1,141.75, which the court refused to set aside as excessive. "If mistake or accident," said the court, "could excuse the sending of a medicine different from that applied for, which we do not admit, and cannot readily conceive, there could have been neither mistake nor accident in this case, because the fact of the previous use of the mill was known to the vendors, and they are absolutely responsible for a consequence which that knowledge enabled them, and made it their duty to avoid. Even accidents or mistakes should not occur in a business of this nature, and they cannot ordinarily occur, without there has been such a degree of culpable, if not wanton and criminal carelessness and neglect, as must devolve upon the party unavoidable and commensurate responsibility." After observing that the vendor of drugs should, like the vendor of provisions, be held as an insurer of the wholesomeness of the articles he dispenses, the Court say, "Sound public policy in relation to the preservation of the health and even of the lives of the people, would seem to require that this rule should have a rigid and inflexible application to cases similar to the one under consideration; as the responsibility of the defendants in this case does not depend upon the degree of care, or diligence, or negligence used by them, but upon the naked fact, that when requested to compound a medicine for plaintiff to be composed *alone* of snake-root and Peruvian bark, the preparation sent to plaintiff contained also the poisonous drug cantharides, which had been recently ground in the same mill, the taking of which caused him great pain, suffering and sickness, if it has not permanently injured his health."

Liability for malpractice, as has been shown in the case of physicians and apothecaries, does not depend upon the existence of any direct contract between the parties, but is based upon the obligation which the law imposes on any person who undertakes the performance of an act which directly affects the health or lives of others, so to execute it that no injury shall result from his agency. The principle was applied in the case of Gladwell *v.* Steggall, in which the declaration stated that the plaintiff, an infant, employed the defendant, a surgeon, to cure her, and then claimed damages for a misfeasance. The defendant alleged that he was not employed by the plaintiff. It appeared in evidence that the defendant had previously attended other members of the family, and his bill in this instance was made out to the plaintiff's father. The defendant was sent for by the mother of the child, and the child allowed him to operate. Chief Justice Tindal remarked that this was evidence that she employed him and that he accepted the employment. It was accordingly held that it was immaterial by whom defendant was employed, or, if material, plaintiff's submitting to defendant's treatment was sufficient proof of the allegation of employment by her.* The medical man who is intrusted with the care of a patient is thereby empowered to adopt such treatment as is adapted to the varying necessities of the case, and is only liable for the abuse of his authority. Where a party to a suit alleges that the physician or surgeon has exceeded his reasonable discretionary powers, the burden is upon him to establish that fact. Thus, where the wife of the defendant, being afflicted with a dangerous disease, was carried by him to a distance from his residence, and left under the care of the plaintiff as a surgeon; and after the lapse of some weeks the plaintiff performed an operation on her for the cure of the disease, soon after which she died; the Supreme Court of Massachusetts decided, in an action by the plaintiff against the defendant to recover compensation for his services, that the performance of the operation was within the scope of the plaintiff's authority, if in his judgment it was necessary or expedient, and that it was not incumbent upon him to prove that it was necessary or proper under the circumstances; or that before he performed it he gave notice to the defendant; or that it would have been dangerous to the wife to wait until notice could be given to the defendant.* The plaintiff in this case, which was tried in 1837, lived sixty miles from the defendant's place of residence, where he himself had once lived, and was a surgeon of good repute. The disease with which the defendant's wife had been afflicted was a scrofulous affection which was not a cancer or cancerous when she was placed under the plaintiff's care. Ten weeks afterwards he amputated her breast, and she died about a week after the operation. The defendant had no communication from the plaintiff nor from his own wife from the time that he carried her to the plaintiff, until a day or two before her death, when he went to the plaintiff's house. Chief Justice Shaw, who delivered the opinion of the court, observed that although it might have been prudent for the surgeon to have communicated with the husband under these circumstances, yet he could safely trust to the judgment of the wife, and that her assent was to be presumed; that if the defendant intended to show that the operation was unnecessary or improper, under the circumstances, or that it was unskillfully or carelessly performed, the burthen of proof was on him. In another Massachusetts case,† where an action for malpractice was brought by husband and wife against a physician for unskilful treatment of a cut upon the wife's thumb, several physicians testified that the disease of the thumb was a felon, which often resulted from a punctured wound. There was evidence tending to show that the defendant did not communicate to the plaintiff the nature of the disease, but that he opened her thumb, giving as a reason that there was a nerve partly cut off, and it would be better to cut it entirely off. It was held that in such action it is competent for the defendant to prove that physicians in addressing their patients often call the tendon of the thumb a nerve; and that it is good medical treatment in some cases for physicians to withhold from patients the extent of their disease and their actual condition; and that the treatment of the disease, as detailed by the principal witness

* 5 Bingham's New Cases, 733.

* McClallen *v.* Adams, 19 Pickering, 333.

† Twombley *v.* Leach, 11 Cushing, 397.

for the plaintiff, was proper in the opinion of medical men.

Although a medical man may err in his diagnosis, this alone will not render him liable for an injury, for a physician or surgeon is not chargeable for ignorance of a case if he prescribes for it rightly.* Where, however, the defendant showed a want of ordinary skill in not detecting the kind of injury for fifteen days and the patient suffered pain and increased expense in consequence thereof, even though he afterwards refused to submit to a proper remedy, it was held that he could recover damages for his special injury. In this case the court observed that it was proper to allow the plaintiff to exhibit the injured limb to the jury.† It is obvious that in diseases of a contagious or infectious nature, a degree of care is required from the medical attendant commensurate with the dangers which would result from their extension. It is the duty of physicians who are attending patients afflicted with such disease, when called to attend other patients not so infected, to take all such precautionary measures as experience has proved necessary to prevent its communication to them. And the fact that a physician who was called in was warned that if he attended any patients affected with the smallpox, his services would be dispensed with, and another employed, failed to deny that he was attending such patients, and promised not to do so, but continued to attend, and did communicate smallpox to the patient, was proper evidence to go to the jury, on a suit to recover the charge for attention to reduce the damages.‡ It was held in the same case that a physician who communicates to his patient an infectious disease is responsible in damages for the suffering, loss of time and danger to which the patient may be subjected. And the defendant, in an action by a physician to recover for his services, may reduce the recovery by pleading and proving that the physician communicated an infectious disease to his family, and that from this cause his attendance was protracted and his bill increased. It is observed by Ordronaux that what is said of smallpox in the above case will apply with equal force to *puerperal* fever, so that physicians attending upon patients affected with this latter disorder should avoid visiting parturient women, or they may be made responsible in damages for the consequences of communicating it to them. "Nor," he continues, "is the responsibility less in cases of *vaccination*, where the physician, while he does not guarantee the *specific* value of the vaccine virus, yet guarantees its freshness, so that if he inoculate a patient with virus in an altered stage, constituting, as it then would, mere putrid animal matter, and erysipelas, or any injury to a limb arises, requiring its amputation, he will undoubtedly be held responsible for the suffering, loss of time, and permanent injury to the patient."§

The measure of damages in suits for malpractice will depend upon the peculiarities of each case, and regard is generally had to the circumstauces of the parties themselves.‖ No absolute rule can be laid down on this subject, which is largely in the discretion of the jury, and it is only in cases when their verdict is clearly against the weight of evidence and there is reason to believe that they were actuated by passion or by some undue influence perverting their judgment, that the court will disturb their finding. In Howard v. Grover,* the court observed that the practice of surgery is indispensable to the community, and while damages should be paid for negligence and carelessness, surgeons should not be deterred from the pursuit of their profession by intemperate and extravagant verdicts. Reference is made to the small sums paid to country practitioners for professional services as compared with their city brethren. In an interesting case in Ohio of alleged malpractice in ophthalmic medicine and surgery, in which depositions of prominent New York and Boston oculists were read, the court observed in charging the jury, "Should you find that the plaintiff is entitled to damages at all, you are to limit them strictly to the effect of the malpractice. It would be outrageous to charge the loss of time, the suffering, the loss of eye-sight to the defendants, if it was the natural result of disease, even if they were guilty of some little delinquency, not in itself producing the sad effect. Nothing must be charged to them but what is to be traced directly to their want of ordinary care and skill, and dependent upon it."† In cases, however, of manifest disregard by the medical man of his professional obligations, exhibiting gross negligence by which the patient suffers injury, the plaintiff may recover vindictive as well as actual damages.‡ This is in accordance with the well settled principle of law which allows a jury in actions of trespass or tort, to have in view the enormity of the defendant's conduct rather than compensation to the plaintiff.§ In such cases of malpractice, the object is not so much indemnity to the patient as punishment of the physician.

It is a common complaint among medical men that surgeons are more liable to suits for malpractice than physicians, and that while the former are held responsible for the imperfect reparation of nature, the latter may often violate with impunity the plainest obligations of professional duty. There is a good deal of truth in this charge, and it is not difficult to understand the reasons for the invidious distinction. The processes of surgical art are more palpable than the operations of the physician, and the results of treatment are more obvious in the former case than in the latter. Every surgeon knows that even a simple fracture when oblique, or when the joint is involved, or the osseous system diseased, sometimes presents difficulties which no care and skill can overcome, and that in compound fractures the obstacles are often still more formidable. Yet these are the cases most prolific of verdicts against medical men. The surgeon is too often regarded as only a skilful mechanic who can repair a fracture as easily as his brother workman can mend a chair. The law of compensation works here to his disadvantage.

* Fowler v. Sergeant, 1 Grant, 355. † Ibid.
‡ Piper v. Menifee, 12 B. Munroe, 466.
§ Ordronaux, Jurisprudence of Medicine, p. 93. Landon v. Humphrey, 9 Connecticat, 209.
‖ Fowler v. Sergeant, 1 Grant, 355.

* 28 Maine, 97.
† McMillen v. Hewitt, Sprague & Rodman in Elwell on Malpractice and Med. Ev., pp. 146-162.
‡ Cochran v. Miller, 13 Iowa, 128.
§ Per Grier, J., in Stimpson v. The Railroads, 2 Wallace, 164. Sedgwick on The Measure of Damages, 4th ed., pp. 522-539.

The praise which follows a brilliant operation is balanced by the blame that attends a failure. Few unprofessional observers, who admire the manual dexterity shown by a skilful operator, are aware that this executive skill is not the most important qualification of the great surgeon. They do not know that behind and above it are qualities more solid though less showy, which constitute his best claim to distinction. They are ignorant that the intuitive perception of the exigencies of a case, in which the scalpel moves with the quickness and precision of the mind that directs its course, is the last result of learning and experience which are fashioned into faculty and wielded as a weapon. As they do not understand that the scientific knowledge which determines the necessity of an operation is a more valuable attainment in the surgeon than the mechanical knowledge which qualifies him to perform it, it can hardly be expected that they should appreciate the importance of those truths of pathology, anatomy, and physiology, which must be grasped by the surgeon who would guide the knife to a successful issue, or attain that higher and profounder knowledge, that mastery of all the resources of his art, which, in a critical emergency, enables him not to cut, but to cure. The masses see only results, and charge the surgeon with the unfortunate consequences due to adverse influences that would baffle the most consummate ability and the most conscientious care. The physician, on the other hand, is judged more leniently. The air of mystery which envelops his operations, and the impossibility of tracking the course of his remedies, has an impressive influence on the popular mind, which is always prone to see wisdom in obscurity and to regard the unintelligible with veneration and awe. His diagnoses are beyond the reach of unprofessional criticism, and even the formulas of his prescriptions and the nature of his remedial agents, are "caviare to the general." Nor when the tell-tale tombstone reveals the fate of his patients is it possible for untrained or remote observers to determine whether they passed away in nature's appointed time, or whether their demise was hastened by his incapacity or misconduct. It is from these causes that medicine has become the chosen field of operations for cheats and tricksters, who, using the admitted uncertainties of medical science as a shield which, unfortunately, has proved alarmingly effective to protect them from the clutch of the criminal law, boldly traffic in the weakness and credulity of men. They thus convert an agency which, in the hands of conscientious and competent practitioners, is fruitful in benefits to suffering humanity, into a device for pandering to the frailties and vices of their fellows in order to gratify their morbid desire for notoriety, their prurient passions, or their sordid greed. There is no more melancholy chapter in human history than that which recounts the success of these pretenders, and as people seldom profit by the experience of others or their own, the record repeats itself. The warnings conveyed by the public press and the sacrifice of valuable lives by the most unmitigated quackery, could not keep the London populace in comparatively recent days, from crowding the rooms of St. John Long, where noble lords and marchionesses jostled common clay in their eager striving for the coveted treatment of that pretended consumption curer, whose polished manners and artful assurance obtained for him the patronage of the fashionable world, and whose flagrant malpractice finally brought him to the criminal bar, from which he emerged, acquitted in one case and sentenced to pay an inadequate fine in another, to be more courted and patronized than ever before.* Thus it is that, as the difficulty of proving malicious intention has protected the criminal malfeasant, so the difficulty of tracing the connection between his treatment and the results of it protects the incompetent physician from a civil action for malpractice, while the surgeon is deemed responsible for the results of natural causes, which he is unable to modify or control, or for the misconduct of others. In these cases it is clear that he is not *legally* liable.

We may remark here that the law holds the consulting physician or surgeon responsible for the possession and exercise of the same qualifications which are required in the general practitioner. Negligence or want of ordinary skill on his part, whenever contributiug to the injury of a patient, makes him equally liable with the attending medical man.† But he is not responsible for the acts of his professional associate after he has been discharged by the patient. No arrangement, however, can be made between the consulting and attending surgeon without the consent of the patient, which will preclude him from holding both of them responsible for acts of unskilfulness or negligence. Such acts, when committed by either of them and not disavowed by the other, are presumed to be done with his sanction and approval. If it could be showa that by an agreement between the parties one medical man acted solely as adviser, while the other attended exclusively to the practical management of the case, neither of them could be held liable for the other's default. But ordinarily, where a physician or surgeon is called in for consultation, and one is subordinated to the other in the control and direction, so that the relation of principal and agent might be said to subsist between them, the former would of course be responsible for the latter's misfeasance, while the agent would still be liable for injuries resulting from his own misconduct, because he has no right to undertake an office implying the exercise of ordinary care and skill in the treatment of disease without possessing and applying the requisite qualifications.‡ As in all cases of this kind the determination of the facts is for the jury, it would ordinarily require very cogent evidence to satisfy them that such a relation of principal and agent, or any other than a joint responsibility, subsisted between the different medical men having the charge of the case, as to exonerate any of them from liability, although if the fact of agency were clearly proved, the principal could not be held liable for the criminal acts of his agent who, in such a case could be held to answer to a suit for dam-

* Rex v. St. John Long, 6 Bingham, 440, and 6 Carrington and Payne, 423.

† Moran v. Burnham, Boston Med. and Surg. Journal, N. S., Vol. V., No. 5.

‡ Hilliard on Torts, 2d ed., vol. ii. p. 466. Parsons on Contracts, 4th ed., vol. i. p. 47.

ages or to an indictment, according to the nature and extent of the injury. The principal in such a case may recover in an action of tort against the agent for all the damages caused by the latter's want of reasonable care or skill.*

In view of the risks to which the surgeon is exposed in the ordinary practice of his profession, it has been suggested that in all cases where injuries to the joints or bones are suspected, if the parties applying for treatment are unknown, or are not regarded as perfectly honest and honorable, the medical man should either refuse to attend, or should take the precaution to obtain from the patient, before undertaking the management of his case, a bond covenanting not to sue for damages if deformity or permanent loss of use in a limb should follow the injury which he has been called upon to treat; or to stipulate in a simple contract that he shall not be held responsible for unskilfulness or negligence. Ordronaux, in his recent work,† maintains that "as the law does not consider the physician a guarantor of cures, and therefore does not hold him liable for inevitable results occurring in the natural course of diseases, no immunity bond can ever be necessary to him." Undoubtedly if the theory of the law were always carried out in practice, this observation would be absolutely correct. But the ends of justice are too often defeated by the inevitable imperfection of its instruments, and thus it happens that juries sometimes make very serious mistakes, and subject medical men to responsibility for something more than the exercise of ordinary and reasonable care and skill, by inability to discriminate between the injuries which flow from their agency and those which result from natural causes beyond their control, or from the misconduct of others. Ordronaux then says, in reference to these immunity bonds, that "such an instrument would in reality be worthless, because in its very nature against public policy. For it is against that spirit of equity which should regulate the transactions of mankind, to allow any one to contract for exemption from the legal consequences of his own wrongful acts; and to no other acts do legal consequences, in the nature of penalties, attach. Hence, no physician, by any special contract, can exonerate himself from responsibility for either not doing, or not doing well, his duty towards a patient." No adjudicated case or text book is cited in support of this doctrine by the learned author, and we think it cannot be upheld either on principle or authority. The writer evidently misapprehends the nature of the conditions which make an instrument void as being against public policy. The settled doctrine is that an agreement is not void on this ground, unless it manifestly contravenes public policy and be injurious to the interests of the State.‡ These interests, of course, are those of the masses of the community which cannot be legally interfered with by any of its members. But the law is in favor of the largest liberty to the individual, so long as it does not trench on the rights of others. It permits him to waive any of his legal rights, and if he enters into a contract with another to that effect, he will be held to its stipulations, unless they are detrimental to the welfare of the community. Such detriment must be clearly manifest to restrain a person from the exercise of that freedom of action which the law guards with jealous care. An act may clearly infringe the rights of another, and thus constitute a tort for which the wrong doer can be held responsible in damages, yet if the injured party who alone is prejudiced by such action chooses to exempt the tort feasor from legal liability, he can do so, and his contract of exemption constitutes a legal defence to the wrong doer who, in the absence of such special contract, would be liable for his tortious acts. This doctrine applies to all those cases of implied contracts where the law imposes responsibility, and a breach of which is technically a tort or wrong done to the other party to such contract. It is therefore applicable to the case of the medical man. As he is not bound to attend a person, his promise to do so is a good consideration for the patient's relinquishment or waiver of his rights, and an immunity bond being a sealed instrument, implies consideration. For mere negligence or want of ordinary skill he may legally exempt himself by a contract with the patient, who alone is affected by his wrong doing. This doctrine, that a wrong doer can exempt himself from responsibility, is only limited by those considerations of public policy to which we have adverted. If the medical man is not merely negligent or unskilful, but is guilty of misconduct which is so stamped with bad faith and fraud that it borders on criminal culpability, then, and not till then, does the law invalidate the contract which would otherwise exempt him from the consequences of those injuries to a patient which the latter agreed to overlook. It is here that private agreements are overruled by public policy.

The principles just enunciated have been applied by the courts in analogous cases affecting the rights of railway passengers. Although the law holds common carriers of passengers to a more rigid liability than is imposed on medical men, obliging them to take every person who can pay for a ticket, and exacting from them the utmost care and diligence, yet it has been held that railroad corporations can exempt themselves for injuries to a passenger resulting from their negligence, or that of their employées, by a notice to that effect printed on the ticket which forms the evidence of their contract with him, and are only liable for the fraudulent, wilful or reckless misconduct of their servants and agents.* This doctrine, as laid down by the New York Courts, has been sanctioned by Redfield in his recent work on Carriers and other Bailments.† Although in these

* Ashley v. Root, 4 Allen, 504.

† Jurisprudence of Medicine, p. 104. Phila. 1869. We cordially commend the manual of Prof. Ordronaux to the profession as embodying in a convenient form the essential principles of Medical Jurisprudence, and as supplying a real want in this department. In availing ourselves in these pages of some of the results of his investigations, we have had occasion to test the accuracy of his citations and the carefulness of his research, and can bear witness to his uniform correctness and fidelity.

‡ Chitty on Contracts, 10th Am. ed. p. 736, and cases cited. Thus although any contract which can prevent or impede the due course of public justice is invalid, yet the private rights of an injured party may be made the subject of agreement in cases where, by the previous conviction of the defendant, the rights of the public have been preserved inviolate. Ibid. pp. 742-743.

* Welles v. N. Y. Central Railroad, 26 Barbour, 641. Boswell v. Hudson River R. R., 5 Bosworth, 699.

† §350.

cases the passenger was travelling on a free pass, yet the decision was based not upon this fact, but upon the special contract of exemption, and, indeed, the highest judicial tribunal in this country has decided in conformity to the doctrine to which we have adverted, that the liability of a railway company is the same whether or not there is any pecuniary consideration for such transportation. "The confidence induced by undertaking any service for another," said Mr. Justice Grier, in delivering the opinion of the Court, "is a sufficient legal consideration to create a duty in the performance of it."* It has often been said that the law recognizes no degrees in negligence, and the court in one of the New York cases just referred to, use the word as including all negligence, gross as well as slight, and pronounce the railway company's special contract as fully binding to the extent of exempting them from all loss or liability to loss or damage from injuries resulting from mere negligence—not arising from bad faith or fraud. And the phrase gross negligence, which is used in these cases to signify something from which no contract can exempt a party who has thereby caused injury to another, means fraudulent, wilful or reckless misconduct.† This would be *contra bonos mores*, and therefore condemned by the policy of the law.‡ It may be said, therefore, in conclusion, that although an immunity bond or other contract of exemption will not protect a medical man from the consequences of his wilful, reckless, or fraudulent misconduct, it constitutes a valid legal defence to a suit for malpractice based on mere unskilfulness or negligence from which a patient has suffered injury. It is another question, which it is not our province to determine, whether the requirement of such a contract of exemption is advisable under any circumstances. We certainly should not be in favor of any conduct in a medical practitioner which, as has been said of this, would be derogatory to his *dignity*. But genuine dignity does not depend solely upon externals. In its highest and primitive meaning it is synonymous with worth. No requirement which enables a professional man to legally protect himself, in order that he may do good to others, can conflict with real dignity, and whoever has that, need not trouble himself about the pretentious ceremonial which too often assumes its name. A great historian has said that he should cheerfully bear the reproach of having descended below the dignity of history if he could succeed in placing a true picture of the past before his readers. And a conscientious physician might in the same spirit abate a little of his artificial dignity in the interest of others as well as his own. "Certainly," says Ordronaux, "it is a derogation of his dignity and an attempt on his part to pervert the equitable streams of jurisprudence, to demand an instrument which shows upon its face that the physician has no confidence in his own skill, nor in the honesty of the patient. It is better far to refuse the case than to take it with such a defilement of the trust." These remarks assume that the contract of exemption is taken for an unworthy purpose, and they can only be justified by the writer's belief in the illegality of such agreements, which, as we have shown, is untenable. Assuming, as we do, their validity, no presumption of this kind can attach to them when used by a respectable practitioner.

It should be borne in mind that we do not commend these contracts as intrinsically desirable, but only defend their use under certain circumstances on the score of necessity. It is easy for the city doctor rejoicing in a large and profitable practice to tell his rural brother to refuse a case rather than accept it with a proviso of exemption, which may be misinterpreted by an ignorant or suspicious patient or his friends. The answer to this is, that circumstances alter cases. It is no hardship for the successful city M.D. to take a case of this kind, as he can afford to stand a trial for malpractice which would probably result in his favor, and the expenses of which, in any event, he could easily bear. He can also decline to attend without any injurious consequences to himself, because it is impossible to meet all the calls upon his time, and the fact that he is obliged to turn away patients is only evidence of the public appreciation of his services. Nor will his refusal be construed as inhumanity, because he can either pass the patient over to some deserving young doctor, in need of practice, or send him to the Dispensary. Thus without any sacrifice on his part of benevolence or of his standing with the public, with its attendant pecuniary considerations, or of the welfare of the patient, he may take or refuse the risks against which a contract of exemption is intended to provide. But the country practitioner cannot well decline a call under like circumstances, because his refusal to attend might injure his professional prospects as well as work great injury to patients, who, if such a rule were adopted, would suffer from the lack of medical attendance. In the exercise of a sound discretion he may feel that he cannot afford to run the risk of a suit for malpractice, which, without fault on his part, may ruin him for life; from the inability of a jury when led away by the appeals of a skilful and perhaps unscrupulous lawyer to discriminate between the agency of the defendant and the misconduct of the patient or of his unprofessional attendants, or the influence of nature's imperfect reparation in occasioning the alleged deformity or other unfortunate result. Nor is the requirement of a bond of this kind a reflection on the honesty of the patient. Ignorance is proverbially suspicious, and a weak man is oftentimes more dangerous than a wicked one. The patient may be in the hands of ignorant or unscrupulous advisers, and in such a case he is easily persuaded to countenance a scheme of speculative litigation of which he is the unconscious instrument or the passive tool. It is the charity patient who is frequently the plaintiff in these cases, and the victim is often a poor man. If this is the penalty of benevolence, we have no reason to wonder at the so-called hardheartedness which is the popular term for the unwillingness of a medical man who has once passed through such an ordeal to attend a certain class of patients when the task is not only thankless but dangerous. A physician in large practice in the suburbs of this city, who is known and honored for his skilfulness, fidelity and kindness of heart, feelingly described to us, not a

* Phila. & Reading Railway *v.* Derby, 14 Howard, 483.

† Welles *v.* N. Y. Central Railway, 26 Barbour, 645.

‡ Parsons *v.* Monteith, 13 Barbour, 360. Redfield on Carriers and other Bailments, § 365.

great while ago, the annoyance to which he was subjected in a suit of this kind by an Irish charity patient, in which his professional qualifications and conduct were commented on in a vein of depreciatory criticism by adverse counsel, and he was only saved from a disastrous verdict by the testimony of a Catholic priest who had vainly endeavored to dissuade his parishioner from prosecuting a groundless action. The physician said that he could'nt afford to take care of such patients. Thus the misconduct of one, may work serious injury to a great many. Our friend was able to bear the expense of a trial which would have crippled a small country practitioner, and he needed no favorable verdict to sustain him in the good opinion of his professional brethren and the public. But we speak for others less fortunate, though perhaps not less deserving, when we say that under such circumstances to avail himself of a mode of exemption, which the law allows, the medical man is only adopting a measure of precaution which subserves his interest and that of the public. It may be said that such a practice is liable to abuse, but this argument may be urged against every beneficial agency, and it should be borne in mind that no immunity bond or other contract of exemption can absolve the medical man from liability for wilful and fraudulent misconduct. Such a contract is not to be recommended for indiscriminate adoption, but the medical practitioner, in the exercise of a sound discretion, must determine whether necessity requires its use in any particular case. We may remark that this course has been commended by the first American editor of Taylor's Medical Jurisprudence* and in the columns of this Journal,† without, however, examining the legal bearings of the question, or considering the reasons for it in detail. The fact that it is not forbidden by the Code of Ethics of the American Medical Association, that may be presumed to have had it under review, affords an implication in its favor. We should not have deemed it necessary to discuss the question, had not the learned author of the Jurisprudence of Medicine expressed such decided opposition to these contracts of exemption as void in law, and derogatory to the honor and dignity of the medical profession. It is gratifying to believe that the necessity for such contracts is not so urgent as it was a dozen years ago, when the number of actions for malpractice brought against respectable practitioners caused a good deal of excitement in the medical profession. Most of these cases, we may add, were settled in favor of the defendants; and in view of the creditable conduct of juries and of the counsel for the plaintiff in some of these actions, the editors of this Journal were led to observe that suits for malpractice, although sometimes working injustice to individuals, are as beneficial to the profession generally as they often are to the accused.‡ But although it is easy to see, as was then intimated, that actions for malpractice tend to discourage quackery, and that the liability to such actions makes the number of quacks in surgery less than that in medicine, because the difficulty of proving unskilful treatment is greater in the latter case than in the former, yet the firmest opponents of quackery are sometimes discouraged in this way. It is surely not less important to protect an honest man than to punish a knave. There is a point when such suits would result unfavorably, by deterring honorable practitioners from encountering hazardous risks, and it is to meet cases of this exceptional character that contracts of exemption are desirable. Within these limits the medical man, under the salutary restraints which are imposed by his relations with his professional brethren and the public, may safely exercise a reasonable discretion.* Considering the intimate relations in which medical men are thrown with all sorts of people, it is a matter of surprise that actions for malpractice are not more common. As juries represent the average intelligence and discrimination of the masses, the ultimate remedy for such suits must be found in the increased skilfulness and fidelity of physicians, and the diffusion among the people of that physiological knowledge which will enable them, while holding the medical man to the high requirements of his position, to have a better appreciation of the inevitable limitations which hamper the best professional attention and ability.

We have considered thus far the liability of medical men for malpractice in civil actions. In a future article we shall discuss their *criminal* liability in this respect, with reference to the leading cases which have attained to the dignity of *causes célèbres*.

* 6th Am. Ed., p. 304. † Feb. 5, 1857.
‡ Boston Medical and Surgical Journal, Feb. 5, 1857.

* Another precaution which it is advisable for a surgeon to adopt when attending a patient of doubtful character, is to take a witness with him when he sets a limb, or performs any important operation, so that his actual treatment may be made clear to the jury, who otherwise might be misled by the unconscious or intentional misstatements of the patient or his friends. A brother surgeon who knows and can describe just what was done, is the best witness under such circumstances, for the medical experts on whose opinions the decision of the case may largely depend, will be able to judge of the propriety of the treatment from his account of it, better than from the testimony of an unprofessional observer. Care should be taken by the medical witness not to give advice or assistance to the attending surgeon, for he might thus subject himself to joint liability with him.

Medical and Surgical Journal.

Boston: Thursday, June 9, 1870.

In placing at the head of the Editor's table the following poem, read by Dr. O. W. Holmes, at the recent dinner of the Massachusetts Medical Society, we attain the object of our hunger and thirst. We had failed to secure it by our own syren songs of persuasion, though attuned to their most dulcet notes. But the following letter from the poet's former friends in the profession

in Berkshire was too much for his obduracy—and here we have it.

Pittsfield, Mass., June 3d, 1870.

PROF. O. W. HOLMES:—

Dear Sir,—At the last meeting of the Berkshire District Medical Society, held at Pittsfield on Wednesday, June 1st, the following resolution was unanimously passed:—

"*Whereas*, We have heard from those members of our Society who were present at the Annual Dinner, in Boston, May 25th, of the remarkable excellence of the poem of Dr. O. W. Holmes,

"*Resolved*, That the Berkshire District Medical Society, through its Secretary, express to Dr. Holmes its earnest desire that the poem may be published, in order that every member of this Society, as well as the whole world, may have an opportunity to read and enjoy it."

In communicating to you this vote, my dear sir, allow me to add, that, although the Berkshire doctors have little doubt but that your poem will soon appear in print; yet, residing as they do in a county which remembers you with sincere affection, and meeting in a town which still loves to identify itself with you, and hearing your poem most enthusiastically described, they could not but make this request, deeming it most meet that the songs of their favorite poet should re-echo, as of old, among the sunny hills of Berkshire.

I remain with sincere respect, very truly yours,

J. F. ALLEYNE ADAMS, *Sec. pro tem.*,
Berkshire Dist. Med. Society.

RIP VAN WINKLE, M.D.

AN AFTER-DINNER PRESCRIPTION

Taken by the Massachusetts Medical Society, at their Meeting held May 25th, 1870.

CANTO FIRST.

Old Rip Van Winkle had a grandson, Rip,
Of the paternal block a genuine chip;
A lazy, sleepy, curious kind of chap;
He, like his grandsire, took a mighty nap,
Whereof the story I propose to tell
In two brief cantos, if you listen well.

The times were hard when Rip to manhood grew;
They always will be when there's work to do;
He tried at farming—found it rather slow—
And then at teaching—what he didn't know;
Then took to hanging round the tavern bars,
To frequent toddies and long-nine cigars,
Till Dame Van Winkle, out of patience, vexed
With preaching homilies, having for their text
A mop, a broomstick—aught that might avail
To point a moral or adorn a tale,
Exclaimed—"I have it! Now then, Mr. V.!
He's good for *something*—make him an M.D."!

The die was cast; the youngster was content;
They packed his shirts and stockings, and he went.
How hard he studied it were vain to tell—
He drowsed through Wistar, nodded over Bell,
Slept sound with Cooper, snored aloud on Good;
Heard heaps of lectures—doubtless understood—
A constant listener, for he did not fail
To carve his name on every bench and rail.

Months grew to years; at last he counted three,
And Rip Van Winkle found himself M.D.
Illustrious title! In a gilded frame
He set the sheepskin with his Latin name,
RIPUM VAN WINKLUM, QUEM WE—SCIMUS—know
IDONEUM ESSE—to do so and so;
He hired an office; soon its walls displayed
His new diploma and his stock in trade,
A mighty arsenal to subdue disease
Of various names, whereof I mention these:
Lancets and bougies, great and little squirt,
Rhubarb and Senna, Snakeroot, Thoroughwort,
Ant. Tart., Vin. Colch., Pil. Cochiæ and Black Drop,
Tinctures of Opium, Gentian, Henbane, Hop,
Pulv. Ipecacuanhæ, which for lack
Of breath to utter men call Ipecac,
Camphor and Kino, Turpentine, Tolu,
Cubebs, "Copeevy," Vitriol—white and blue,
Fennel and Flaxseed, Slippery Elm and Squill,
And roots of Sassafras and "Sassa'rill,"
Brandy—for colics—Pinkroot, death on worms—
Valerian, calmer of hysteric squirms,
Musk, Assafœtida, the resinous gum
Named from its odor—well, it does smell some—
Jalap, that works not wisely, but too well,
Ten pounds of bark and six of Calomel.

For outward griefs he had an ample store,
Some twenty jars and gallipots, or more:
Ceratum simplex—housewives oft compile
The same at home, and call it "wax and lle";
Unguentum Resinosum—change its name,
The "drawing salve" of many an ancient dame;
Argenti Nitras, also Spanish flies,
Whose virtue makes the water-bladders rise—
(Some say that spread upon a toper's skin
They draw no water, only rum or gin)—
Leeches, sweet vermin! don't they charm the sick?
And Sticking-plaster—how it hates to stick!
Emplastrum Ferri—ditto *Picis*, Pitch;
Washes and Powders, Brimstone for the——which,
Scabies or *Psora*, is thy chosen name
Since Hahnemann's goosequill scratch'd thee into fame,
Proved thee the source of every nameless ill,
Whose sole specific is a moonshine pill,
Till saucy science, with a quiet grin,
Held up the Acarus, crawling on a pin?
—Mountains have labored and have brought forth mice:
The Dutchman's theory hatched a brood of—twice
I've well nigh said them—words unfitting quite
For these fair precincts and for ears polite.

The surest foot may chance at last to slip,
And so at length it proved with Doctor Rip.
One full-sized bottle stood upon the shelf
Which held the medicine that he took himself;
Whate'er the reason, it must be confessed
He filled that bottle oftener than the rest;
What drug it held I don't presume to know—
The gilded label said "Elixir Pro."

One day the Doctor found the bottle full,
And, being thirsty, took a vigorous pull,
Put back the "Elixir" where 'twas always found,
And had old Dobbin saddled and brought round.
—You know those old-time rhubarb-colored nags
That carried Doctors and their saddle-bags;
Sagacious beasts! they stopped at every place
Where blinds were shut—knew every patient's case—
Looked up and thought—the baby's in a fit—
That won't last long—he'll soon be through with it;
But shook their heads before the knockered door
Where some old lady told the story o'er
Whose endless stream of tribulation flows
For gastric griefs and peristaltic woes.

What jack o' lantern led him from his way,
And where it led him, it were hard to say;
Enough that wandering many a weary mile
Through paths the mountain sheep trod single file,
O'ercome by feelings such as patients know
Who dose too freely with "Elixir Pro.,"
He tumbl—dismounted, slightly in a heap,
And lay, promiscuous, lapped in balmy sleep.

Night followed night, and day succeeded day,
But snoring still the slumbering Doctor lay.
Poor Dobbin, starving, thought upon his stall,
And straggled homeward, saddle-bags and all;
The village people hunted all around,

But Rip was missing—never could be found.
"Drowned," they guessed;—for more than half a year
The ponts and eels *did* taste uncommon queer;
Some said of apple-brandy—other some
Found a strong flavor of New England rum.

—Why can't a fellow hear the fine things said
About a fellow when a fellow's dead?
The best of doctors—so the press declared—
A public blessing while his life was spared,
True to his country, bounteous to the poor,
In all things temperate, sober, just and pure;
The best of husbands! echoed Mrs. Van,
And set her cap to catch another man.

—So ends this Canto—if it's *quantum suff.*,
We'll just stop here and say we've had enough,
And leave poor Rip to sleep for thirty years;
I grind the organ—if you lend your ears
To hear my second Canto, after that
We'll send around the monkey with the hat.

Canto Second.

So thirty years had past—but not a word
In all that time of Rip was ever heard;
The world wagged on—it never does go back—
The widow Van was now the widow Mac—
France was an Empire—Andrew J. was dead,
And Abraham L. was reigning in his stead.
Four murderous years had passed in savage strife,
Yet still the rebel held his bloody knife.
—At last one morning—who forgets the day
When the black cloud of war dissolved away?
The joyous tidings spread o'er land and sea,
Rebellion done for! Grant has captured Lee!
Up every flagstaff sprang the Stars and Stripes—
Out rushed the Extras wild with mammoth types—
Down went the laborer's hod, the schoolboy's book—
"Hooraw!" he cried—"the rebel army's took!"
Ah! what a time! the folks all mad with joy:
Each fond, pale mother thinking of her boy;
Old gray-haired fathers meeting—Have-you-heard?
And then a choke—and not another word;
Sisters all smiling—maidens, not less dear,
In trembling poise between a smile and tear;
Poor Bridget thinking how she'll stuff the plums
In that big cake for Johnny when he comes;
Cripples afoot—rheumatics on the jump,
Old girls so loving they could hug the pump,
Guns going bang! from every fort and ship—
They banged so loud at last they wakened Rip.

I spare the picture, how a man appears
Who's been asleep a score or two of years;
You all have seen it to perfection done
By Joe Van Wink—I mean Rip Jefferson.
Well, so it was—old Rip at last came back,
Claimed his old wife—the present widow Mac—
Had his old sign regilded, and began
To practise physic on the same old plan.

Some weeks went by—it was not long to wait—
And "please to call" grew frequent on the slate.
He had, in fact, an ancient, mildewed air,
A long grey beard, a plenteous lack of hair—
The musty look that always recommends
Your good old Doctor to his ailing friends.
—Talk of your science! after all is said
There's nothing like a bare and shiny head—
Age lends the graces that are sure to please,
Folks want their Doctors mouldy, like their cheese.

So Rip began to look at people's tongues
And thump their briskets (called it "sound their lungs"),
Brushed up his knowledge smartly as he could,
Read in old Cullen and in Doctor Good.
The town was healthy; for a month or two
He gave the sexton little work to do.

About the time when dogday heats begin,
Measles and mumps and mulligrubs set in;
With autumn evenings dysentery came,
And dusky typhoid lit his smouldering flame;
The blacksmith ailed—the carpenter was down,
And half the children sickened in the town.
The sexton's face grew shorter than before—
The sexton's wife a brand-new bonnet wore—
Things looked quite serious—Death had got a grip
On old and young, in spite of Doctor Rip.

And now the Squire was taken with a chill—
Wife gave "hot drops"—at night an Indian pill;
Next morning, feverish—bedtime, getting worse,
Out of his head—began to rave and curse;
The Doctor sent for—double quick he came:
Ant. Tart. gran. duo, and repeat the same
If no et cetera. Third day—nothing new;
Percussed his thorax—set him cussing, too—
Lung-fever threatening—something of the sort—
Out with the lancet—let him blood—a quart—
Ten leeches next—then blisters to his side;
Ten grains of calomel——just then he died.

The Deacon next required the Doctor's care—
Took cold by sitting in a draught of air—
Pains in the back, but what the matter is
Not quite so clear—wife calls it "rheumatiz."
Rubs back with flannel—gives him something hot—
"Ah!" says the Deacon, "that goes *nigh* the spot."
Next day a *rigor*—run, my little man,
And say the Deacon sends for Doctor Van.
The Doctor came—percussion as before,
Thumping and banging till his ribs were sore—
"Right side the flattest"—then more vigorous raps—
Fever—that's certain—pleurisy, perhaps.
A quart of blood will ease the pain, no doubt,
Ten leeches next will help to suck it out,
Then clap a blister on the painful part—
But first two grains of *Antimonium Tart.*
Last, with a dose of cleansing calomel
Unload the portal system——that sounds well!

But when the self-same remedies were tried,
As all the village knew, the Squire had died;
The neighbors hinted—"this will never do,
He's killed the Squire—he'll kill the Deacon too."

—Now when a doctor's patients are perplexed,
A *consultation* comes in order next—
You know what that is? In a certain place
Meet certain doctors to discuss a case
And other matters, such as weather, crops,
Potatos, pumpkins, lager beer and hops.
For what's the use?—there's little to be said,
Nine times in ten your man's as good as dead—
At best a talk (the secret to disclose)
Where three men guess and *sometimes* one man knows

The counsel summoned came without delay—
Young Doctor Green and shrewd old Doctor Gray—
They heard the story—"Bleed!" says Doctor Green,
"That's downright murder! cut his throat, you mean!
Leeches! the reptiles! Why, for pity's sake,
Not try an adder or a rattlesnake?
Blisters! Why bless you, they're against the law—
It's rank assault and battery if they draw!
Tartrate of Antimony! shade of Luke,
Stomachs turn pale at thought of such rebuke!
The portal system! What's the man about?
Unload your nonsense! Calomel's played out!
You've been asleep—you'd better sleep away
Till some one calls you"——
"Stop!" says Doctor Gray—

"The story is you slept for thirty years;
With brother Green, I own that it appears
You must have slumbered most amazing sound;
But sleep once more till thirty years come round,
You'll find the lancet in its honored place,
Leeches and blisters rescued from disgrace,
Your drugs redeemed from fashion's passing scorn,
And counted safe to give to babes unborn."

Poor sleepy Rip, M.M.S.S., M.D.,
A puzzled, serious, saddened man was he;
Home from the Deacon's house he plodded slow
And filled one bumper of "Elixir Pro."
"Good bye," he faltered, "Mrs. Van, My dear!

I'm going to sleep, but wake me once a year;
I don't like bleaching in the frost and dew,
I'll take the barn, if all the same to you.
Just once a year—remember! no mistake!
Cry 'Rip Van Winkle! time for you to wake!
Watch for the week in May when laylocks blow,
For then the Doctors meet, and I must go."

—Just once a year the Doctor's worthy dame
Goes to the barn and shouts her husband's name,
"Come, Rip Van Winkle!" (giving him a shake)
"Rip! Rip Van Winkle! time for you to wake!
Laylocks in blossom! 'tis the month of May—
The Doctors' meeting is this blessed day,
And come what will, you know I heard you swear
You'd never miss it, but be always there!'"

And so it is, as every year comes round
Old Rip Van Winkle here is always found.
You'll quickly know him by his mildewed air
The hayseed sprinkled through his scanty hair,
The lichens growing on his rusty suit—
I've seen a toadstool sprouting on his boot—
—Who says I lie? Does any man presume—
Toadstool? No matter—call it a mushroom.
Where is his seat? He moves it every year;
But look, you'll find him—he is always here—
Perhaps you'll track him by a whiff you know—
A certain flavor of "Elixir Pro."

Now, then, I give you—as you seem to think
We can drink healths without a drop to drink—
Health to the mighty sleeper—long live he!
Our brother Rip, M.M.S.S., M.D.!

SURGICAL ANÆSTHESIA AT THE HANDS OF SIR JAMES Y. SIMPSON.

THE present editor of the *British Medical Journal*—which is now in fact as well as in name the organ of the British Medical Association—in the number for May 14, 1870, gives an extended obituary notice of Sir James Y. Simpson. In the course of it we find these words, confirmatory of some points which have been made in these pages:—"In respect to the discovery of chloroform, Sir James has, as is well known, received from the public a far higher award than he claimed. The word chloroform has come to be considered synonymous with anæsthetics; and the discoverer of chloroform has been too often spoken of as if he were the discoverer of anæsthetics. The real honor of the application of anæsthetics (suggested by Davy and others) belongs of course to America, and not to England, and to the dental branch of our profession." * * * *

"In the Boston Medical and Surgical Journal of about the same date [November, 1846] was an important paper by Dr. [H. J.] Bigelow, on cases in which ether had been used.

"The next number of Dr. Forbes's Review, April, 1847, had of course a long article devoted to the new discovery, which began with the following words:—"One of the most remarkable events in the history of medicine regarded as a practical art, is certainly that which has excited so much attention in Europe and America during the last four months—THE EMPLOYMENT OF THE VAPOUR OF ETHER AS A MEANS OF ABOLISHING PAIN in the practice of Surgery, Midwifery, and Medicine." The capitals in this quotation are those of the reviewer, and show clearly the importance which he attached to the discovery and its precise nature. As regards the extent to which the American [!] practice had come into usé, the following extract from the same article is good evidence. "It is assuredly true that by means of the new process not a little of that dreadful suffering heretofore inseparable from the performance of most capital operations, has been abolished in the practice of the most eminent surgeons in Europe and America during the three or four months just elapsed."

Speaking of "Dr. Simpson," again the editor of the *British Medical Journal* says, "Thus it will be seen that he was a thorough convert to the practice of anæsthesia before he knew of chloroform, and had written in loud praise of ether." * * * Chloroform had been discovered by Damas in 1834.* In the beginning of 1847 Floureus experimented with it on animals. It was tried in the human subject by Simpson in the latter part of 1847. A paper on it was read by him to the Edinburgh Medico-chirurgical Society, November 10th. Its trial had been suggested to him by Dr. Waldie of Liverpool. Many others were working on the subject of anæsthetics; and chloric ether had, indeed, we believe, been used in London before chloroform in Edinburgh. * * * The position of Sir James Y. Simpson in reference to anæsthetics may be easily stated. *He had of course no claim whatever to their introduction, nor is it probable that their general acceptance would have waited for his advocacy of their claims.*

* The United States Dispensatory says "chloroform was discovered by Mr. Samuel Guthrie, of Sackett's Harbor, N. Y., in 1831, and about the same time by Soubeiran in France, and Liebig in Germany."—ED. B. M. & S. J.

*Indeed, as we have seen, ether had come into a very wide use before chloroform was proposed."**

Mr. Jonathan Hutchinson, in a letter to the *London Medical Times and Gazette*, with reference to the deceased Baronet, says:—

"No one claims for him that he was exempt from human frailties, nor will any one acquainted with the facts doubt that the public has accorded to him a larger share of credit in reference to anæsthetics than was his due, and some will be ready with pain to admit that, at moments, he appeared to yield somewhat to the seductive temptation to accept praises which were offered in a degree of error. It is rather to his life's work that his friends appeal. They cite with confidence his zeal in medics, antiquarian research, his eloquent antagonism to quackery, his discoveries in therapeutics and operative surgery, and the great fact that a large part of his laborious career was devoted to subjects which had no relation to his practice, or to his own special part of the profession. His ten years' work at acupressure, if it be to end at last in failure, came as close as possible to a glorious success, and reflected the utmost credit on both his head and heart. For a time it seemed likely that it would be accepted by the whole medical profession. Lastly, his exertions to reduce the mortality of large hospitals were undertaken from a most noble motive, and will doubtless result in the greatest good."

Mass. Charitable Eye and Ear Infirmary.—The following operations requiring ether, are the principal ones performed at the Infirmary during the three months ending June 1st, 1870, generally in the presence of medical gentlemen as visitors.

Cataract	11
Iridectomy	12
Hernia iris	1
Passavant for posterior synechia	13
Cystoid cicatrix	1
Ext. Foreign Body	2
Paracentesis	5
Enucleation of globe	7
Staphyloma cornea	1
Pterygium	1
Scalping lids for trichiasis	5
Lengthening palpebral aperture for entropion	5
Entropion	2
Plastic on the lids	6
Rodent cancer of lids	1
Tumors	5
Strabismus convergent and divergent	21
Total	99

H. Derby, M.D.,
F. P. Sprague, M.D.,
B. Joy Jeffries, M.D.,
Attending Ophthalmic Surgeons.
June 3, 1870.

* The italics are ours.—Ed. B. M. & S. J.

Cultivation of Cinchona in India.—According to a recent report by the Assistant Superintendent of the Botanic Garden at Calcutta, the cinchona tree is successfully produced in Madras and Bengal. The number of plants at Darjeeling, on an area of 905 acres, exceeds 3,000,000, the increase during the past year being 673,654. The tallest plants grown there are nineteen feet high.—*Philadelphia Medical and Surgical Reporter.*

Aqua Puncture.—Drs. Mallet and Pouillet have recently made comparative trials with water and solutions of morphia, injected subcutaneously. It was found that a few drops of clear water injected over the seat of pain was followed by relief; but that the effect of the water was a *little more* evanescent than that of the morphia solution.—*Richmond and Louisville Medical Journal.*

The Secretary of War has appointed Surgeons S. A. McParlin, D. C. Huntingdon, and Van Buren Hubbard a Board to examine into the physical qualifications of members of the graduating class at West Point, and also the candidates for admission to the Academy.—*Philadelphia Medical and Surgical Reporter.*

DEATHS FROM CHLOROFORM.

In Berlin, last winter—not reported.—We learn of it through a private letter from a medical gentleman abroad to a medical friend here.

In the *Chicago Medical Examiner* Dr. Andrews records his belief that, in England and this country, probably not one-fifth of the deaths occurring from anæsthesia are published. The data which we have at hand are not sufficient to warrant any exact approximation of this proportion, but we are sure that very many deaths from chloroform are never made public. Our readers are already familiar with our views on the impropriety of the use of this anæsthetic.—*N. Y. Medical Journal.*

Medical Miscellany.

PROGNOSIS IN HEPATIC ABSCESS.—Dr. W. Stewart, in the *Lancet*, states as the result of a large experience in India, that where hepatic abscesses burst through the right lung, recovery is not uncommon under ordinary restorative and expectant treatment, while in cases where the discharge took place through other channels, "as into the transverse colon, stomach, etc., or externally through the parietes of the thorax or abdomen—whether naturally or by artificial opening," he has not met with a favorable termination. He hence concludes that "prognosis is favorable in uncomplicated cases, when the abscess makes its way through the lung. In such cases the abscess occupies the upper or convex portion of the liver, near the suspensory ligament; adhesive inflammation occurs on its outer surface; the diaphragm forms a part of the sac, and its substance is gradually removed by progressive absorption. If, at the same time, adhesion takes place between the diaphragmatic and pulmonary pleura, the abscess will open into the parenchyma of the lung, and be discharged more or less completely by expectoration. In such ceses, the matter may escape by a small opening directly into a bronchical tube, or filter through immeasurably small orifices into the air-cells; and the process of filtration and aspiration, if I may so express it, following on the respiratory acts, may be the reason why such abscesses do not have an unhealthy action—ordinary atmospheric air carrying 'septic germs' being excluded—the products of respiration alone taking the place of the expectorated matter, and being continually renewed by the same process."—*New York Medical Gazette.*

IN consequence of the troubles which arose in the lecture room of Prof. Tardieu, the minister of public instruction, upon the demand of the professors, suspended the lectures and examinations until the 1st of May. This disciplinarian measure has not been applied to Marine Surgeons, who, says the *Official Journal*, took absolutely no part in the disorderly conduct, and who came to Paris to pass their examinations. Why was this principle not applied to the internes of the provincial hospitals, who came to Paris for the same purpose?

The *Union Médicale* says that the troubles of the Ecole de Médecine may be considered at an end. M. Tardieu delivered his course recently before a calm and attentive audience. Measures had been taken that none but students of the fourth year should have access to the amphitheatre. They numbered three hundred.—*Exchange.*

THE number of deaths in Paris from smallpox is daily increasing. From the 17th to the 23d April there were 132 deaths, and 166 from the 24th to the 30th. These results are surprising in view of the great number of revaccinations which have taken place within four or five months past; the documents presented to the Academy by M. Vernois would lead one to impute the numerous cases of unsuccessful revaccination to vaccine taken from the animal, and to find in this fact the principal reason for the growing increase of the actual epidemic. It is therefore more urgent than ever to return to the vaccine of Jenner.—*Ibid.*

THE readers of the JOURNAL, we are sure, will excuse any delay in the issue of this number, in view of the largely additional and exceedingly interesting matter with which it is filled.

MEMBERS of the profession interested in Diseases of the Eye are invited to visit the Ophthalmic Clinique of the Boston City Hospital, at their convenience, on Mondays, Wednesdays and Fridays, from 9 to 11 o'clock.
HENRY W. WILLIAMS, M.D., *Oph. Surgeon.*

TO CORRESPONDENTS.—Communications accepted:—Mayor Shurtleff's Address—Acupressure and Sir J. Y. Simpson.

ERRATUM.—On page 385, in our issue for May 19, in speaking of Prof. Boeck, for "belief" read *disbelief.*

MARRIED,—June 1st, 1870, Geo W. Rossman, M.D., of Ancram, N. Y., to Miss Frank N. Green, of Amenia, N. Y.

DIED,—In Lowell, June 3d, Dr. J. P. Jewett, a graduate of the Medical Department of Dartmouth College in the class of 1835, aged 62 years.

Deaths in fifteen Cities and Towns of Massachusetts for the week ending June 4, 1870.

Cities and towns.	Number of deaths in each place.	Prevalent Diseases. Consumption.	Pneumonia.
Boston . . .	96	14	13
Charlestown	7	2	0
Worcester . .	24	8	1
Lowell	20	1	2
Milford	4	1	0
Chelsea	4	1	0
Cambridge . .	16	2	1
Salem	6	2	1
Lawrence . . .	8	2	2
Springfield . .	2	1	0
Gloucester . .	6	1	1
Fitchburg . . .	6	1	0
Taunton . . .	7	2	0
Newburyport.	4	2	0
Fall River . .	9	1	1
	219	41	22

From information recently received there is reason to believe that in many towns of Massachusetts vaccination has been much neglected of late years, and that consequently large numbers of persons are now exposed to danger from smallpox. This disease is now epidemic in the city of Worcester, where it caused three deaths during the past week. Six deaths from croup and four from scarlet fever are reported from all the above-named places.
GEORGE DERBY, M.D.,
Secretary of State Board of Health.

DEATHS IN BOSTON for the week ending June 4th, 96. Males 49—Females 47.—Abscess, 2—accident, 3—disease of the bladder, 2—congestion of the brain, 2—disease of the brain, 1—bronchitis, 2—cholera infantum, 2—consumption, 14—convulsions, 2—croup, 3—cyanosis, 1—debility, 5—diarrhœa, 1—dropsy of the brain, 2—erysipelas, 1—scarlet fever, 1—typhoid fever, 3—gastritis, 1—disease of the heart, 4—intemperance, 2—disease of the kidneys, 2—inflammation of the lungs, 13—marasmus, 2—measles, 1—old age, 2—pleurisy, 1—premature birth, 4—rheumatism, 1—scrofula, 1—suicide, 1—tetanus, 1—tumor, 1—unknown, 10—whooping cough, 1.

Under 5 years of age, 39—between 5 and 20 years, 9—between 20 and 40 years, 21—between 40 and 60 years, 14—above 60 years, 13. Born in the United States, 64—Ireland, 28—other places, 4.